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CASES IN EQUITY PLEADING,

SELECTED WITH SPECIAL REFERENCE TO THE SUBJECT OF

DISCOVERY.

BY

C. C. LANGDELL,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

PREPARED FOR USE AS A TEXT-BOOK IN HARVARD LAW SCHOOL.

CAMBRIDGE:
CHARLES W. SEVER.
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CASES IN EQUITY PLEADING.

HINDMAN *v.* TAYLOR.

BEFORE LORD THURLOW, C. JUNE 8 AND NOVEMBER 16, 1785.

[*Reported in* 2 *Brown's Chancery Cases*, 7.]

AN agreement had been entered into between the plaintiff, who was commander of a large trading ship (an East Indiaman), and the defendant, for the purchase of the command; and, accordingly, a contract was made, by which the plaintiff covenanted, in consideration of £4000, to resign the command, in order that the defendant might be appointed to it. Three thousand pounds were paid into the hands of Sir Charles Raymond and Company, bankers, by the defendant, to be applied to the drafts of the plaintiff, if the defendant should be appointed; otherwise to those of the defendant: and a bond was given for £1000. The defendant was appointed, and made a voyage; but afterwards a new agreement was entered into, and £2000 being paid on the part of the defendant to Wildman, in whose hands the contract was, he, by the consent, as he understood, of both parties, suffered the names to be taken off the contract.

The plaintiff filed this bill for a discovery of the agreement, stating the £2000 to have been paid in discharge of the bond, and of £1000 of the remaining sum due. To this bill the defendant pleaded the facts stated as above, in bar to the discovery, as amounting to a release.

The plaintiff had also excepted to the defendant's answer, with respect to the payment of the sum into the banker's hands; and the exceptions having been overruled, had excepted to the Master's report.

The plea having been argued in Trinity term last, the Lord Chancellor had overruled it, on the ground that a plea of a legal bar is not a good plea to a discovery of matter in aid of a legal remedy; but his Lordship had ordered it to come on again with the exceptions to the Master's report.

Mr. *Madocks*, Mr. *Scott*, and Mr. *Stainsby*, in support of the plea.

The facts stated by the plea bring the matter to this question, whether a bill being filed for a discovery in aid of a legal remedy, a plea of matter, which will make an end of the cause at law, will be a good plea to the discovery. Such a plea ought to be good, otherwise the practice of the court does not support the purposes of justice. Where the relief is equitable, the plea to the relief is a bar to the discovery; therefore, if the plea be of matter which will be a bar at law, it ought, upon the same principles, to be a bar to the discovery. If it be not, a man, without any legal claim, may have a discovery of all the transactions of another's life. It has been thrown out as a doubt, whether the defendant could plead to the discovery any bar but an equitable one; but there are many instances of a legal bar being pleaded. In a bill for an account, and relief prayed, a settled account may be pleaded, and is held to be a good plea, unless the plaintiff amends his bill, and shows particular mistakes. So, if a plaintiff files a bill in aid of his legal remedy, if there has been a release, that may be pleaded in bar to the bill in aid, as well as to a bill for equitable relief. The cases in 1 Vern. 179; 2 Atk. 1, are instances of a plea of an account. An award may be pleaded, 3 Atk. 529, 644; so a fine and non-claim shall be pleaded in bar, 1 Chan. Cases, 278.

To what end should the defendant be harassed with questions which can answer no purpose? Unless the plaintiff has a right, the court will never suffer the defendant to be compelled to answer. If the bar pleaded be a legal bar, and a question of law arise upon it, the court will take the opinion of a court of law how far it is a bar there; but, in this case, there can be no doubt; the acceptance of the money, and taking the names off the agreement, put an end to the plaintiff's claim. Lord Hardwicke, in Brownsword *v.* Edwards, 2 Ves. 247, says, a plea must suggest a fact, it must go to a hearing; and if the party does not prove the fact, the court may direct an examination on interrogatories. Here, if the defendant should not prove the facts stated, he may be examined to discover the agreement; if he does, Hindman will be bound by the subsequent agreement to take the £2000.

Mr. *Mansfield* and Mr. *Ainge* for the plaintiff.

It is not stated in the plea that the plaintiff accepted the £2000 in satisfaction of the whole sum agreed for; it is only stated that the names were taken off the agreement, and a memorandum made, that the plaintiff agreed the names should be taken off, and that he should acquit the defendant of the payment of more. This memorandum is in the possession of the defendant. Wherever a written agreement is detained or destroyed by the defendant, it makes the strongest ground possible for a discovery. If a legal bar were permitted to be pleaded here in bar of the discovery, it would deprive the plaintiff of the right

of having the fact tried by a jury, or its legal effect. This is entirely new doctrine. There is no case, or even *dictum*, to support the position that such a plea can be a bar to a discovery. All the cases are, where the plaintiff has come for relief into the court of equity. There, if the defendant can answer (for to this purpose a plea is an answer) by a short point, it is admitted in that form. Here, though the plea be of a single fact, yet, the question being of the legal effect of that fact, the admission of it as a plea would translate the jurisdiction.

Mr. *Madocks*, in reply. The plaintiff will not be deprived of a trial by jury; for, if there is any fact in doubt which ought to go to a jury, the court will send it to one for trial. The question is, whether the acceptance of the £2000 in full is equivalent to a release. There is no question of law to decide.

It stood over a few days.

Lord Chancellor. As a plea, this cannot stand. A plea in bar to the action is not a plea to the discovery. The matters pleaded are all special objections, not a general plea to the discovery. If you can plead that which is a bar to the action, and have it tried as a bar to the discovery, the whole is wrong. The more I think of it, the more I am convinced it cannot be set up as a bar to the discovery. The reason for permitting a plea in bar to the relief is to prevent the going into the whole cause, by that which, if it stood *per se*, would put an end to it; but where the bill is for discovery, the cause ends with the answer. Then the whole remedy being, upon the face of the transaction, at law, the question is, whether you shall by the plea bring the whole merits on here. I strip the case of the matter of answering improper questions, because that is to be judged of in a different manner. I take it upon the general prayer. If he had prayed relief it would have been demurrable; and now you say he shall not have a discovery, because his relief is at law. This is a case where he has no election, he must sue at law. The dry question is this, whether there is any objection, in natural justice, to a defendant giving a discovery in order to found a relief at law. The question, whether he shall answer improper inquiries, being out of the case, I think he cannot bar the plaintiff from giving him the trouble of an answer. Where the bill is for relief, the discovery is merely ancillary to the relief; therefore, if the defendant can show that, without going further, there is one point which will bar the relief, the court will first look into that point. The court there takes the plea as the first method of getting at that justice which the subject has a right to obtain. Where the remedy is legal, to let the defendant refuse the discovery, is putting matters out of their train; for the court can ultimately do nothing as to the remedy. If the bill

be for equitable relief, and the plea be overruled, the defendant has this objection, that the court has put him to a great expense, in going through a cause, where he had brought it to a point which ought to have decided it in his favor. In the same case, if the remedy is at law, he has only to complain that he has been put to the expense and trouble of putting in a longer answer. As to the expense of the copy and answer, that the court exempts him from; for the moment the answer comes in, he must be paid all the expense he has been at: and, as to the trouble, the court cannot relieve him from that; therefore I think myself founded in declaring, that where the bill is for a discovery leading to relief at law, the defendant cannot plead, in bar here to the discovery, what will be a bar to the relief there.

Plea and exceptions overruled.

GAIT *v.* OSBALDESTON.

BEFORE SIR JOHN LEACH, V. C. NOVEMBER 15, 1820.

[*Reported in* 5 *Maddock*, 428.]

THE bill was for discovery in aid of a trial at law, and for an injunction to restrain the defendant from setting up at law an outstanding term.

Plea, to the whole bill, of title in the defendant.

Mr. *Rose*, in support of the bill, contended that the main purpose of the bill was for a discovery, to enable the plaintiff to defend himself at law, and that the relief prayed, in respect of outstanding terms, was merely an incidental and collateral relief; and that it had never been held that a bill of discovery can be met by showing a title and a legal cause of action.

Mr. *Sidebottom*, contra, insisted that by the plea the relief sought as to the outstanding term was answered, and it was shown a discovery was unimportant and unnecessary; and that as by the plea the defendant's title was stated, and a discovery in fact given, if that were necessary, the plaintiff was not entitled to any further discovery.

The VICE-CHANCELLOR. The plea of title would have been good as to the relief sought by the injunction against the outstanding term, but is not good as to the discovery, because here the discovery is not incidental to that relief; and as to discovery in aid of legal title, the plea of no legal title is no defence, for that is the very question which is to be tried at law.

SAME CASE.

BEFORE LORD ELDON, C., ON APPEAL, MARCH 1, 1826.

[*Reported in* 1 *Russell*, 158.]

THE bill, filed by David Gait and Mary his wife, stated that William Hayes, being seised of certain freehold lands, died in 1745, intestate; that Mary Hayes, his only child and heiress-at-law, who intermar-

ried with Joseph White, since deceased, also died intestate, and seised of or entitled to the lands in fee-simple; that thereupon the lands descended to her only child, the plaintiff, Mary, who was the heiress-at-law both of Mary White and of William Hayes; that William Penney disseised her, and got possession of the title-deeds; and that, after his death, the defendants entered into possession of the property under an alleged title derived from him. It charged that Mary White never disposed of her estate and interest in the premises, and that the defendants threatened to avail themselves of an outstanding term as a defence to an action which the plaintiffs had instituted. The prayer was for a discovery in aid of the proceedings at law, and an injunction to restrain the defendants from setting up any outstanding terms in the action.

A plea was put in to the whole of the discovery and relief prayed by the bill. The plea stated, in effect, that, in Trinity term, 1764, Joseph White and Mary his wife duly levied a fine of certain hereditaments, of which the lands in question were parcel; that it was declared by a deed executed by them both that the fine should inure to the use of such persons and for such estates as Joseph White should by deed or will appoint, and, for want of such appointment, to the use of Joseph White in fee; that, in 1765, Joseph White did, for valuable consideration, appoint and convey the premises to William Penney, his heirs and assigns; and that William Penney thenceforth, down to the time of his death, and the several persons entitled under him down to the filing of the bill, had been in quiet possession of the lands which the plaintiffs claimed.

The Vice-Chancellor overruled the plea, on the ground, it was stated, that a plea of no legal title was not a defence to a bill which prayed discovery in aid of an alleged legal title.

The defendants appealed.

Mr. *Horne* and Mr. *Sidebottom*, for the appeal.

Mr. *Rose*, contra.

The LORD CHANCELLOR allowed the plea.

MENDIZABEL *v.* MACHADO.

BEFORE SIR JOHN LEACH, V. C. NOVEMBER 14, 1826.

[*Reported in* 1 *Simons*, 68.]

THIS was a bill for discovery, and for a commission to examine witnesses abroad, in aid of an action at law, commenced by the plaintiff against the defendant, to recover a very large sum of money, out of which the plaintiff alleged that he was entitled to be reimbursed the sums which, under the orders of the executive government of Spain, he had advanced to that government.

To this bill the defendant put in a plea and answer. The substance of the plea was that the title to call upon the defendant for the money in question was not in the plaintiff, but in other parties.

All the important parts of the bill and plea are fully stated in the judgment. It was agreed on the part of the plaintiff to waive any objection that might be made to the defence, on the ground of the plea being overruled by the answer.

Mr. *Heald* and Mr. *Russell*, for the plea, insisted that if the facts put in issue by the plea were true (and in the present stage of the cause they must be taken to be so), the discovery sought by the bill must be utterly useless. Williams *v.* Everett;[1] Yates *v.* Bell.[2]

Mr. *Sugden* and Mr. *O. Anderdon*, for the bill. It is clear, from the facts stated in the bill, that an action would lie against the defendant for money had and received. But if the plea is to prevail, there must be an end to any such action; for it would be impossible for the plaintiff, without the discovery which is sought by the bill, to give the evidence necessary to support the action. This is a negative plea to a bill for discovery. It is admitted that there may be a negative plea to a bill for relief; but it is questionable whether such a defence is available against a bill for discovery. There is, besides, in this plea, a studied ambiguity as to that part which relates to the particular fund in the hands of the defendant. But if the case made by the plea is true, it would afford matter for a valid defence at

[1] 14 East, 582. [2] 3 Barn. & Ald. 648.

law. It has, however, been decided, in Hindman *v.* Taylor,[1] that a plea of matter which is a good defence to the action at law in aid of which the bill is filed is not a bar to the discovery.

Mr. *Heald*, in reply. There is no such rule, as to bills for discovery, as that which is contended for. In Baillie *v.* Sibbald,[2] the Statute of Limitations was pleaded to a bill for discovery in aid of an action. It might there have been said that the matter pleaded to the bill was a good defence to the action at law; but it was not so held by the court, although the plea was overruled upon a different ground.

The VICE-CHANCELLOR. The substance of this bill is, that in the month of April, 1822, the French government placed at the order and disposition of the Spanish government a sum of eighteen millions and a half of francs, of the money of France, in *rentes* or inscriptions in the treasury of France, and that twelve millions of such *rentes* were shortly afterwards, by order of the executive government of Spain, paid or transferred into the name of Mr. Noguera, who was at that time the *chargé d'affaires* of Spain at Paris; and that, in the month of August, 1822, Mr. Noguera, being removed from his official situation, by the order of the executive government of Spain, transferred such *rentes* to the defendant Machado, who was confidentially employed by such executive government of Spain, and had received its instructions to hold the *rentes* so transferred to him at the order and disposition of such executive government; that the defendant afterwards, in pursuance of instructions from the executive government of Spain, sold out and transmitted to this country the whole of the said funds, or the greater part thereof, to the amount of £300,000; that the assembly of the Cortes, convened according to the constitution of Spain, by a solemn and legitimate act, authorized the executive government to apply and dispose of the said funds to the exigencies of the executive government; and that thereupon the executive government applied to the plaintiff Mendizabel, who was a merchant, and one of the contractors-general for supplying the army of Spain, to make advances, for the use of the government, upon the faith and credit of the funds so in the hands of the defendant; and that he, the plaintiff, accordingly made such advances to the amount of £111,565 12*s.* 7*d.*, and received, in payment of the same, certain orders or bills of exchange, drawn by the treasurer-general of Spain upon the defendant. The bill insists that the defendant was bound to pay such bills to the plaintiff; and that, having refused to accept or pay the same, he, the plaintiff, had commenced an action against him in this country, and had caused him to be arrested and held to

[1] 2 Bro. C. C. 7; s. c. 2 Dick. 651. [2] 15 Ves. 185.

bail for a sum of £80,000. And the bill prays a discovery, from the defendant, of the several facts stated, and a commission for the examination of witnesses in foreign countries, in order to enable the plaintiff to support his action. The bill contains many charges of admissions and conduct on the part of the defendant amounting to acknowledgment of the plaintiff's title.

To this bill the defendant has put in a plea and answer. He professes to answer all those charges in the bill which seek to raise a case against him upon the ground of personal conduct and admissions; and, as to all other the statements and charges in the bill, he puts in a plea for the purpose of protecting himself from any discovery, and in order to deprive the plaintiff of the benefit of the commission for the examination of witnesses.

By his plea he states the several treaties which in the year 1814 were entered into between France on the one part, and the several allied powers on the other, of which Spain was one, and especially refers to the articles of the said treaties, whereby the French government engaged to cause to be liquidated and paid all sums due, in countries beyond its territories, in virtue of contracts or other formal engagements, entered into between individuals or private establishments and the French authorities, both for supplies and legal obligations; and also to the article of the said treaties whereby the several contracting powers engage to appoint commissioners, who were to regulate and effectuate the execution of the former articles, and to employ themselves in the liquidation of the claims thereby provided for.

The plea further states several treaties and conventions, which were afterwards made for the purpose of giving effect to the articles referred to; and it appears to me not to be necessary particularly to notice them, until we arrive at the secret treaty or convention between France and Spain, on the 28th of March, 1818, which professes to have been entered into for the purpose of definitively settling the execution of the articles referred to as far as they regard Spain. By the first article of this treaty, the sum total to be paid by France to the subjects of Spain is fixed at one million eight hundred and fifty thousand francs of *rentes* in inscriptions in the great book of France, representing a capital of thirty-seven millions of francs.

By the second article, in case the part which may be allotted to Spain in the division to be made of the total sum which France will bind herself to pay to the subjects of foreign powers should be below this stipulated sum, the French government engages to make up the deficiency.

By the third article this sum of one million eight hundred and

fifty thousand francs of *rentes* is to be divided into two equal parts, one of which is to be paid into the hands of such person or persons as may be appointed by the Spanish government, upon the same terms and at the same periods as those determined with regard to other powers; and the other part is to remain deposited in the hands of commissioners appointed for that purpose, in equal numbers on both sides, and who shall receive the interest accumulating in a compound ratio, in favor of Spanish subjects, creditors of France, until such time when the mixed commission to be intrusted with the investigation and liquidation of the claims of Spanish subjects against France shall have provided the needful means, and the King of Spain shall have provided the needful means for the payment of the said claims.

By a subsequent treaty between France and all the allies, dated April 25, 1818, the sum total which France binds herself to pay to the subjects of all the foreign powers is fixed at a *rente* of 12 millions and 40,000 francs, or a capital of 240 millions and 800,000 francs; and the part allotted to Spain is fixed at a *rente* of 850,000 francs, representing a capital of 17 millions of francs.

This part, therefore, so allotted, is less, by more than one half, than the sum which, by the secret treaty of the preceding month, France had bound herself to pay to Spain; and, by that treaty, France had obliged herself to make up the difference.

The plea further states that on the 30th of April, 1822, a further treaty was entered into between France and Spain, whereby the French government engages to cause payment to be made, into the hands of such person or persons as may for that purpose be authorized by the King of Spain, of the overplus of the *rentes*, which the French government kept as a deposit, including the whole amount of the compound interest. The plea then avers that the overplus of the *rentes* mentioned in the last treaty was that moiety of the sum agreed to be paid by France to Spanish subjects, which, according to the third article of the treaty of March, 1818, was to remain deposited until the claims of Spanish subjects were liquidated by the mixed commission there referred to.

The effect, therefore, of this last treaty seems to have been to place this deposit, not in the hands of a mixed commission, but in the hands of Spanish commissioners only.

The plea then states that the French government afterwards transferred this overplus to Mr. Noguera, who was duly appointed by the King of Spain to receive the same for the purposes in the said treaties and conventions mentioned; and that Mr. Noguera afterwards transferred part, but not the whole, of such funds into the hands of the

defendant, who was appointed by the King of Spain to receive them for the same purpose of being applied according to the treaties and conventions. The plea then states that, at the dates of these treaties and conventions, there were and still are debts due to individuals and to private establishments within the meaning of the said treaties and conventions, to an amount greater than the said overplus of *rentes* in the hands of the defendant and the remainder of the funds provided for that purpose by the said treaties and conventions will be able to discharge. And the plea further states that a royal decree was duly made by the King of Spain on the 20th of March, 1824, appointing the commissions for the liquidation of the said claims, which it states to have been interrupted by the unfortunate occurrence of March, 1820; and the plea avers that both the said commissions are now in a state of activity.

The plea further avers that the plaintiff had not, nor has, any claim to any portion of the funds provided under any of the said treaties and conventions; and that the moneys in the hands of the defendant, which are claimed by the bill, are portion of the overplus of *rentes* in the said treaty of the 30th of April, 1822, mentioned, or of the proceeds and produce thereof. And the defendant insists upon the said several matters in bar to the discovery and commissions prayed by the bill.

The question to be first considered, therefore, is, whether, taking the several matters stated in this plea to be true, the plaintiff, upon the case made by the bill, has any interest in the funds in the hands of the defendant.

The bill represents that these funds, by virtue of conventional arrangements between the governments of France and Spain, were placed at the order and disposition of the executive government of Spain, and, by the direction of that government, came into the hands of the defendant, to be held by him at the order and disposition of the said executive government of Spain, as he should, from time to time, be instructed; and that afterwards, in the year 1823, the assembly of the Cortes, then legally convened, authorized the executive government to apply these funds to the general exigencies of the State, and that thereupon the then Minister of Finance in Spain requested the plaintiff to make certain advances, which were immediately required for the exigencies of the State, upon the credit of these funds; and that the plaintiff did accordingly make such advances to the amount of £111,566 12*s.* 7*d.*, and received bills of exchange to that amount, which were drawn upon the defendant by the Treasurer-General of the Spanish nation; and the plaintiff seeks the aid of this court to assist him in recovering from the defendant the amount of those bills.

Now, if the plea of the defendant be true, and for the present purpose it must be taken to be so, these funds were not, by the treaty between France and Spain, placed at the order and disposition of the executive government of Spain, nor did they, by the direction of that government, come into the hands of the defendant, to be applied by him, from time to time, as he should be instructed by that government. But, by the treaties between France and Spain, these funds were raised and paid by France, for the special purpose of being applied in satisfaction of the subjects of Spain who were creditors of France, and were no otherwise placed at the order and disposition of the King of Spain, than to enable him to provide for the payment of such claims, when the amount of them should be respectively liquidated by the commissioners for that purpose to be appointed. If the King of Spain himself had attempted, therefore, to divert these funds from the purpose for which they were advanced by France, and to apply them to the general exigencies of his government, it would have been a direct violation of his engagements with France; and, being contrary to the first principles of equity, his purpose would not have been aided by this court.

The Cortes cannot, at the utmost, pretend to more than to stand in the place of the King of Spain, and, as this court would not have assisted the plaintiff in recovering these funds from the defendant, if the plaintiff had claimed them, under the order of the King, in repayment of advances made by him for the exigencies of the State, it necessarily follows that he cannot receive the assistance of this court, claiming them in repayment of such advances, not under the order of the King, but under the order of the Cortes.

The plaintiff, however, contends that if he were to admit that his case is such that he can have no title to be relieved in equity, yet he is still entitled to the discovery and commission, which is all he seeks by this bill, in aid of his action at law; and that the defendant cannot, by plea, protect himself from the discovery. This is surely a singular proposition. For the consequence would be that any person first suing out a writ at law against another might, by a bill in equity for a discovery, compel such other person to disclose, upon oath, all the particulars of any transaction, however secret and important, with which the plaintiff had no manner of concern, merely by introducing into his bill the false allegation that he had an interest in the transaction, since, according to the doctrine of the plaintiff, it would not be permitted to the defendant to protect himself from such discovery, by proving to the court the falsehood of the allegation that the plaintiff had any interest in the transaction.

But the law of the court, as well as the reason of the thing, is

directly the other way; and a defendant is entitled to protect himself from a discovery, by a plea that the plaintiff has no interest in the subject of his suit: and such is the nature of this plea. This is stated by Lord Redesdale[1] to be the doctrine of the court; and the case cited by the plaintiff in support of his proposition, when it is carefully considered, will be found consistent with this doctrine.

I have already stated that the plea of the defendant is accompanied by an answer. The plaintiff very properly waives all objection of form to the answer; and I have not, therefore, entered into the consideration of it. The plea must be allowed.[2]

[1] Treat. Plea. 228.

[2] This decision is said to have been reversed by Lord Lyndhurst on appeal, upon the ground that it appeared from the facts stated that the plaintiff had a right of action. See 4 Sim. 172. — Ed.

MACGREGOR v. THE EAST INDIA COMPANY.

BEFORE SIR LANCELOT SHADWELL, V. C. NOVEMBER 3, 1828, AND JANUARY 28, 1829.

[*Reported in* 2 *Simons*, 452.]

THE plaintiff was the executor of the late Sir John MacGregor Murray, and the defendants were the East India Company, and William Astell, one of the directors, and Joseph Dart, the secretary to the directors. In 1785, Sir John MacGregor Murray was sent by Sir John Macpherson, the then Governor-General of India, on a secret mission to the upper provinces of Bengal, in order to obtain information as to the designs of the native princes, under a promise from Sir John Macpherson that he should be reimbursed his expenses out of the funds of the company. In 1822, Sir John MacGregor Murray died, without having been repaid his expenses; and in Trinity term, 1824, the plaintiff commenced an action of assumpsit against the company for the recovery of them. The defendants pleaded the general issue, and also the Statute of Limitations. In Michaelmas term of the same year the bill in this cause was filed for a discovery and a commission to examine witnesses in India in aid of the action. The bill alleged that many applications were made to the company by Sir John MacGregor Murray in his lifetime, at various intervals and periods, for payment of his expenses; that the company admitted the justice of his claim; and that promises and assurances were, from time to time, made by the authority of the company, or the directors, or their secretary, that the claim should be ultimately satisfied; and that the defendants had in their custody or power divers books, accounts, &c., relating to the matters aforesaid and by which, if produced, the several matters aforesaid, or some of them, did or would appear. The defendants put in to the bill three separate pleas of the Statute of Limitations, in which they stated that they had pleaded several pleas to the action, and, amongst others, the general issue, but did not mention expressly that they had pleaded the statute to the action.

The pleas to the bill were argued before Sir John Leach, V. C., on

the 9th of November, 1825, when his Honor was of opinion that they were bad, as it did not appear upon the record that the defendants had pleaded any plea to the action which would preclude the plaintiff from going into the merits of his case and availing himself of the discovery sought by the bill. Leave, however, was given to amend the pleas. The amended pleas came on for argument on the 19th of April, 1826, before the same learned judge, when it was objected that they averred that the cause of action (if any) arose above six years before the filing of the bill, whereas they ought to have averred that it arose above six years before the commencement of the action, which was prior to the filing of the bill. His Honor allowed the objection, but again gave the defendants leave to amend their pleas, which was accordingly done. The pleas so secondly amended, after stating the date and title of the Statute of Limitations, and the bringing of the action for the same purposes respecting which the discovery was sought, and setting forth the pleas to the declaration, alleged that if the plaintiff, either in his own right or as the executor of the testator, ever had any cause of action against the defendants for the matters contained in the bill, the same accrued above six years before the commencement of the action; and that the defendants did not, by themselves or any other person, at any time within six years before the commencement of the action, or from the commencement of the last-mentioned period of six years down to the filing of the bill, or down to the time when the defendants were served with process to appear to and answer the bill, promise or agree to come to any account for, or to pay or anywise satisfy the testator in his lifetime, or the plaintiff since his death, any money for any of the matters alleged in the bill. On these pleas coming on for argument,

Mr. *Sugden* and Mr. *Roupell*, for the plaintiff, contended that they must be overruled, because the defendants had, neither by their pleas nor by answers in support of them, denied the allegation as to their having in their custody the books and other documents mentioned in the bill, the contents of which might prevent the Statute of Limitations from being a bar to the action.

The VICE-CHANCELLOR. The question is, whether the mere general allegation that has been referred to is to be taken as an averment that there were in the possession of the defendants documents which would overrule their plea and show that there has been a promise within six years; because otherwise the possession of these documents is quite immaterial. Now, upon the authority of a case[1] which was very much considered by my predecessor, the present Master of the Rolls, I think that unless that allegation went further, and averred that by

[1] Qu. James v. Sudgrove, 1 Sim. & Stu. 4.

these documents, or some of them, if produced, it would appear that a promise had been given within six years, the mere allegation that the defendants had in their possession papers relating to the matters aforesaid, and by which, if produced, the several matters aforesaid, or some of them, do or would appear, is immaterial, there not being, as I recollect, any charge in the bill that there has been a promise made within six years, which promise is evidenced by any writing whatever; and, consequently, it appears to me that it was not necessary for the defendants to negative this general allegation, either by averments in their pleas or by answers in support of their pleas.

Mr. *Sugden* and Mr. *Roupell* then contended that the Statute of Limitations could not be pleaded to a bill for discovery in aid of an action at law, because that statute was a defence at law, and the plaintiff was entitled to the discovery in order to enable him to defeat the defence at law; that giving the discovery could do no harm, because, if there was no legal right of action, the discovery would be of no use. Hindman *v.* Taylor;[1] Leigh *v.* Leigh;[2] Mitf. Plead. 218, 219.

Mr. *Horne* and Mr. *Wyatt*, for the defendants, cited Sutton *v.* Lord Scarborough.[3]

The VICE-CHANCELLOR. The counsel for the plaintiff, grounding themselves upon Lord Thurlow's opinion in Hindman *v.* Taylor, have argued that the plea of the Statute of Limitations cannot be used in a case like the present; but Hindman *v.* Taylor is no authority for that. That case only shows that if an action is brought, and a bill of discovery is filed, and certain matters are pleaded, which, if discovered, would amount to a bar to the action at law, the plea of those matters cannot be used as a bar to a bill of discovery. But I do not find that Lord Redesdale has laid it down, or that it is laid down anywhere, that the plea of the Statute of Limitations shall not be used as a bar to a bill of discovery: and I cannot, therefore, think that what appears to have been Lord Thurlow's opinion in Hindman *v.* Taylor can be considered a sufficient ground for me to say that I shall overrule this plea because it is a plea of the Statute of Limitations.

[1] 2 Bro. C. C. 7. [2] 1 Sim. 349. [3] 9 Ves. 71.

ROBERTSON v. LUBBOCK.

BEFORE SIR LANCELOT SHADWELL, V. C. JANUARY 21 AND 29, AND MARCH 6, 1831.

[*Reported in* 4 *Simons*, 161.]

IN 1822, the constitutional government of Spain being desirous of raising a loan, the Cortes authorized 40,000,000 of rials, in *rentes* or annuities, at the rate of five per cent. per annum, to be inscribed in the great book of the public debt of Spain, and to be sold at the best price that could be obtained. The Spanish government afterwards contracted with Bernales & Nephews of London for the negotiation of the sale of the *rentes* or annuities; and, accordingly, bills of exchange were drawn, by the agent of the Spanish government, in favor of the Treasurer-General of Spain, upon, and accepted by Bernales & Nephews, and were negotiated, upon the credit of the *rentes*, in favor of various persons who advanced the value thereof to the government. But Bernales & Nephews not having paid a considerable number of such bills when due, the King and Cortes, by a decree of the 16th May, 1823, authorized the government to carry into effect any contracts that its commissioners in London had made, for the whole or part of the 40,000,000 of rials, and to issue and negotiate such part of the 40,000,000 rials as might be necessary to cover the bills negotiated; and certain persons, named Alzaybar, Loredo, Sierra, and Martinez, were appointed commissioners for carrying the decree into effect.

In July, 1823, the commissioners appointed the defendants Lubbock & Co. and Campbell & Co., of London, to be their agents in the issuing and negotiating of part of the 40,000,000 of rials: and thereupon an agreement, dated the 18th of July, 1823, was made between Lubbock & Co. and Campbell & Co. of the one part, and the commissioners of the other part, and, after reciting that, the Cortes, in order to provide for the payment of the bills of exchange which had been dishonored by Bernales & Nephews, had directed inscriptions to be issued for 580,000 dollars and 24,000 dollars of *rentes* of five per cent. per annum, and the proceeds to be applied in payment of the bills of exchange, and that the commissioners had received instructions from their govern-

ment to proceed (with the agency and assistance of Lubbock & Co. and Campbell & Co.) to the payment of the dishonored bills, and that for those purposes the said two inscriptions of *rentes* had been transmitted by the Minister of Finance, as the authority to the commissioners to grant certificates as after mentioned, and that the commissioners had determined to issue certificates, upon the credit of those inscriptions, for various sums, bearing interest at five per cent. per annum, payable half-yearly: It was agreed as follows:—

Art. 1. That the commissioners should, upon the credit and authority of the inscriptions, issue and sign certificates of different amounts from 25 dollars to 400 dollars *rentes*, bearing interest at five per cent. per annum, payable to bearer; and that the interest or dividends thereon should be made payable at the counting-house of Campbell & Co., but Campbell & Co. were not in any manner to guarantee or become responsible for the payment thereof further than the sums which might be placed in their hands for that purpose; and that Campbell & Co. should be paid such commission for making such payments as therein mentioned.

Art. 2. Martinez (who had been authorized to superintend the payment of the bills of exchange, and who, for that purpose, had been intrusted with the two inscriptions of 580,000 dollars and 24,000 dollars *rentes*) thereby authorized the commissioners to sign and deliver the certificates, upon the credit and authority of the inscriptions, to Lubbock & Co. and Campbell & Co., who thereby bound themselves to deliver the certificates to the holders of the bills of exchange, according to the respective amounts thereof, and Martinez was to sign his approbation of the sums to be paid to each holder of the bills.

Art. 3. That, in addition to the certificates to be issued by the commissioners for providing for the payment of the bills, the commissioners agreed to issue and deposit with Lubbock & Co. and Campbell & Co. such further sum in certificates as should be requisite to raise, by the sale thereof, a sum sufficient to pay two half-years' interest on the first-mentioned certificates, to commence from the 1st of May, 1823, and to be payable by Campbell & Co. on the 1st of November, 1823, and the 1st of May, 1824.

Art. 4. That the defendants should be at liberty to sell the certificates which should be issued to defray the first year's interest, on rendering punctual accounts of the sale thereof to the commissioners, or, in their absence, to the Spanish Minister of Finance.

Art. 5. That the commissioners should allow to the defendants, for managing and negotiating the business agreed to be transacted, a commission of four per cent.

Art. 7. That the defendants should be at liberty to act as agents and

correspondents of any of the holders of the bills, and to receive in those characters the certificates in which such bill-holders were entitled.

Art. 8. That during the period which might elapse in preparing and signing the certificates by the commissioners, the defendants should, with the assistance and concurrence of Martinez, employ themselves in liquidating and ascertaining the sum in certificates to be paid to each holder of bills, and arranging the number and amount of certificates to be delivered in satisfaction of each claim, and that Martinez should sign a duplicate of each account, as the authority for the defendants to deliver to the persons giving up the bills the corresponding amount in certificates.

Art. 9. That the defendants engaged, out of the money they should receive upon the sale of certificates, to pay the commissioners the expenses incurred by them in the execution of their commission; and that the defendants should not, in any manner, or for any purpose, become liable, in any part of the negotiations and transactions thereby agreed upon, to pay, either to the commissioners or to any of the bill-holders, any sum of money whatsoever, further or otherwise than what should be received by them upon the sale of certificates, deducting the commission thereby stipulated to be paid to them.

The bill, after stating as above, alleged that, in pursuance of the contract, Martinez delivered to the defendants divers certificates of *rentes*, to the amount, in the whole, of the two inscriptions of 580,000 and 24,000 dollars of *rentes:* that, at the time of making the contract, the plaintiff was a creditor of the Spanish government to the amount of £2000, and was, under the decree and contract, entitled to receive from the commissioners certificates of 1500 dollars of *rentes;* and that, accordingly, certificates of *rentes* to that amount were delivered by the defendants to the plaintiff, in satisfaction of his claim: that, in addition to the certificates so delivered to the defendants, the Spanish commissioners also delivered to the defendants, pursuant to the 3d art. of the contract, various other certificates of *rentes*, amounting to 125,000 dollars of *rentes*, to the intent that the same might be negotiated and disposed of by the defendants, and the produce thereof applied in payment of the two first half-yearly dividends which should become due on the certificates of 580,000 dollars and 24,000 dollars of *rentes:* that, upon the certificates for the 125,000 dollars of *rentes* being delivered to the defendants, they, by an instrument in writing, dated the 29th of August, 1823, admitted that they had received and held those certificates upon trust and for the purpose of negotiating the same and applying the produce in payment of the two first half-yearly dividends on the first-mentioned set of certificates: that the

defendants immediately sold the whole of the second set of certificates; and that, out of the produce thereof, they paid the holders of the first set of certificates the first half-yearly dividend thereon, and that, after making such payment, the defendants had in their hands a surplus of the produce of the sale of the second set of certificates, more than sufficient for the payment of the remaining half-yearly dividend on the first set of certificates: that the defendants, notwithstanding they realized a sufficient sum for payment of the whole of the first year's interest on the first set of certificates, and had expressly contracted to pay the same, and were, by reason thereof, personally liable to the holders of the last-mentioned certificates for the first year's interest thereon, had refused to pay to the holders of the last-mentioned certificates the other half-year's interest thereon, and although the defendants received and held the money produced by the sale of the second set of certificates, for the use of the holders of the first set of certificates, and as money specifically appropriated to the payment of the first year's interest thereon, yet they had wrongfully converted a part of such produce to their own use: that the defendants had, from time to time, been themselves the purchasers of a considerable number of the certificates, and had frequently speculated in the purchase thereof, for the sake of keeping up the market price thereof, and that they then held a large number of the certificates which had been bought by them; and that they had used part of the residue of the money arising from the sale of the second set of certificates for the purchases of certificates so made by them, and otherwise, for their speculations and private purposes, and that, by reason thereof, they delayed and evaded payment of the remaining half of the first year's interest on the first set of certificates: that the plaintiff had commenced an action in the Court of Common Pleas against them for the remaining half of the first year's interest on the certificates held by him, as being money had and received by the defendants to the use of the plaintiff. The bill charged that the defendants ought to set forth an account of all sums of money received by them on account of the sale of the second set of certificates, and that the defendants had in their custody divers accounts, &c., the examination and production of which would enable the plaintiff to prove his case at law.

The bill prayed for a discovery in aid of the action, and for a production of the documents, in the usual manner.

To this bill the defendants, Lubbock & Co., put in the following plea: That in and previous to May, 1823, and from that time until after the date and execution of the agreement of the 18th of July, 1823, the Cortes of Spain exercised certain authority in that country, by virtue of the constitution of the kingdom of Spain; and that dur-

ing all that period the government of that country was called the constitutional government: that in the month of May, 1823, Alzaybar, Loredo, and Sierra were appointed by the said constitutional government commissioners and agents, for the purpose of issuing such certificates of *rentes* as in the bill mentioned, and, at or about the same time, Martinez was appointed by the said constitutional government its agent, to superintend and control the issuing of such certificates, and to direct the application and disposal thereof, and of the proceeds of such of them as should be sold; and that, soon after the date and execution of the agreement of July, 1823, Martinez and the commissioners delivered to these defendants and to Campbell & Co., as agents, for the purpose of applying and issuing the same under the direction and control of Martinez, the first set of certificates of *rentes*, and on or about the 29th of August, 1823, Martinez and the commissioners delivered to these defendants and to Campbell & Co., as such agents as aforesaid, the second set of certificates of *rentes*, for the object of the same being negotiated and sold by the defendants and by Campbell & Co., under the superintendence and control of Martinez, and the produce thereof applied to the payment of interest, conformable to the said agreement; and that thereupon these defendants and Campbell & Co. did, for the purpose of acknowledging the receipt of the second certificates, and not for the purpose or with the view of declaring any trust in favor of any of the holders of the bills of exchange, or any of the holders of any certificates, give a receipt to Martinez and the commissioners, in the words and figures following, viz.: —

"We have received from Don Antonio Martinez, Don Manuel M. Alzaybar, Don Winceslas de Sierra, and Don José Loredo, Spanish commissioners, the certificates specified hereunder, amounting together to 125,000 hard dollars of *rentes*, for the object of their being negotiated, and the produce applied to the payment of interest, commissions, and charges, conformable to the contract entered into on the 18th of July, 1823. We to hold, at the disposal of the Spanish government, any surplus of amount that may arise.

"Series:

Q.	263	Certificates of 300 dollars each of *rentes*		78,900
O.	1	Ditto . .	100	100
P.	230	Ditto . .	200	46,000
				125,000"

That the first half-year's interest on the first set of certificates became payable on the 1st of November, 1823; and that, therefore, these defendants and Campbell & Co. did, out of the proceeds of such of

the second set of certificates as had been sold, appropriate and set apart the amount of the first half-year's interest on such of the certificates as had been issued, and the same was paid by Campbell & Co. to such of the holders thereof as applied for the same, and that the second half-yearly dividend did not become payable until the 1st of May, 1824; and that, on or about the 1st of October, 1823, the King of Spain, then possessing and exercising all the functions and powers of the Spanish government, by a royal decree, dated the 1st of October, 1823, annulled, revoked, and made void the said appointment of the said Don Antonio Martinez and of the said commissioners, and all the other acts of the constitutional government; and that, in consequence thereof, the agency and authority of the commissioners, and also the agency of these defendants and of Campbell & Co. did thereupon cease and determine.

That these defendants and Campbell & Co. did not appropriate, or agree or undertake to appropriate or apply, any part of the moneys arising from the sale of any of the certificates of *rentes* to, in, or towards the payment of the second half-yearly dividend on any of the certificates; and that, as touching the several matters in the bill mentioned, these defendants were mere agents of the constitutional government of Spain jointly with Campbell & Co., and under Martinez and the commissioners, for the purpose of issuing and disposing, under the superintendence and control of Martinez, of such certificates as were delivered to them for that purpose. And these defendants do aver that neither the plaintiff nor any of the holders of bills of exchange or of certificates was or were parties or privies to the agreement of the 18th of July, 1823, or to the giving of the said receipt. And that the commissioners and Martinez were not, otherwise than as aforesaid, the lawfully authorized and accredited agents of the government of Spain, and that, save as before mentioned, Martinez and the commissioners did not deliver to these defendants and to Campbell & Co. any certificates of *rentes*, to the intent and purpose that the same might be negotiated or disposed of by these defendants and Campbell & Co., and the produce thereof appropriated by them in payment of the two first half-yearly dividends which should become due on any certificates of *rentes;* and that, save as before mentioned, these defendants and Campbell & Co. did not, by any instrument whatever, or in any other manner, testify or admit that they had received or held the second set of certificates, or any part thereof, upon trust, or for the purpose of negotiating the same, and of applying the produce thereof, or any part thereof, in payment of the two first half-yearly dividends, or any dividends or dividend that should accrue on the first-mentioned set of certificates, or any part thereof, or in any manner engage or con-

tract to pay the whole or any part of the first year's interest on the first set of certificates, or any part thereof, or did, in any manner, become personally liable to the holders of the last-mentioned certificates, or any of them, for the first year's interest thereon, or any part thereof, or receive or hold the money produced by the sale of the second set of certificates, or of any part thereof, to or for the use of the holders of the first set of certificates, or any of them, or as money specifically appropriated to the payment of the certificates, or any part of the first year's interest thereon, or on any part thereof.

Mr. *Knight*, Mr. *Kindersley*, and Mr. *Follett*, for the defendants Lubbock & Co., in support of the plea. The bill is filed for a discovery, in aid of an action: it will, therefore, be sufficient to show that the plaintiff cannot maintain any action upon the facts contained in this bill. But we shall also endeavor to show that the plaintiff has no interest whatever in the matter as to which the discovery is sought.

In Lousada *v.* Templer,[1] in which case the bill was filed for a discovery, and for commissions to examine witnesses abroad, in aid of the defence to an action, Lord Eldon thought that the facts, as they appeared on the bill, showed a title to relief in equity rather than at law; and his Lordship therefore refused to grant the commissions, inasmuch as a bill of that description, being auxiliary only to relief at law, must show a legal right; but his Lordship allowed the plaintiff, under the special circumstances of the case, to convert his bill for discovery into a bill for relief.

In this case, the plea consists of several facts; but they all tend to one point, and tender one single issue, namely, that the plaintiff has no interest in the subject-matter of the discovery. That such want of interest is good matter of plea to a bill for discovery as well as to a bill for relief, is expressly laid down by Lord Redesdale.[2] That doctrine was acted upon by Sir John Leach, Vice-Chancellor, in Mendizabel *v.* Machado.[3] That decision was appealed from, and was reversed by Lord Lyndhurst, upon the ground that the facts stated did show that there was a right of action, in which respect only he differed from Sir John Leach.[4] The principle laid down by Lord Redesdale, and upon which Sir John Leach proceeded, was left untouched by Lord Lyndhurst's decision.

In the argument of Mendizabel *v.* Machado, before Lord Lyndhurst, Hindman *v.* Taylor[5] was much relied upon by the counsel for the

[1] 2 Russ. 561. See 564. [2] Treat. Plead. 228, 3d edit. [3] 1 Sim. 68.

[4] The judgment on appeal is not reported. Mr. Knight stated that it was delivered by Lord Lyndhurst in his private room, shortly before his Lordship resigned the Great Seal.

[5] 2 Bro. C. C. 7.

plaintiff. The statement of the facts in that case is not very intelligible; and the language attributed to Lord Thurlow goes to an extent to which it is clear that his Lordship never intended to go, as appears by his subsequent decisions in Newman *v.* Wallis [1] and Hall *v.* Noyes.[2]

Mr. *Pepys, amicus curiæ.* In the King of Spain *v.* Hullett precisely the same plea was put in as in Mendizabel *v.* Machado; and Lord Lyndhurst, in the course of the argument on that plea, had some inquiry made as to Hindman *v.* Taylor, and his Lordship's impression was that it was displaced as an authority for the proposition which, according to the report, it appeared to establish.

[The VICE-CHANCELLOR. Hindman *v.* Taylor is one of the cases in Brown upon which no reliance can be placed with regard to the statement.]

In Baillie *v.* Sibbald [3] it was contended, in argument, that a plea of what would be a bar to an action is not a good plea to a bill of discovery in aid of the action, and Hindman *v.* Taylor was cited; but Lord Eldon did not decide upon that ground, but upon the ground that the letters were an acknowledgment of the debt. Lord Eldon therefore considered that the question whether a defence to the action could be pleaded to the bill of discovery, was still undecided. MacGregor *v.* The East India Company [4] is an authority that a legal bar may be pleaded to a bill of discovery provided it has been pleaded to the declaration.

The case stated by this bill is that the defendants, as the agents for the Spanish commissioners in the business of the loan, received certificates which they were to convert into money, and apply the proceeds in paying interest on the loan. The plaintiff alleges that he is a shareholder of the loan, and that the defendants have received the proceeds of the certificates, in part, for his use; and, therefore, that he has a right to maintain an action against them for money had and received, in aid of which he requires the discovery sought by the bill. The facts stated by the plea amount to this, that though the defendants did receive the certificates and sell them, and receive the proceeds, they received them as the agents of the commissioners, and not as the agents of the holders of the loan. The defendants were agents for individuals with whom the plaintiff dealt, and acted under their superintendence and control: the plaintiff, therefore, cannot have any demand whatever against the defendants, much less can he have any demand against them which is sustainable in a court of law. Supposing that there was any contract in this case, a contract with A. for the benefit of B. does not give B. a right of action against A.

[1] 2 Bro. C. C. 143.
[2] 3 Bro. C. C. 483.
[3] 15 Ves. 185.
[4] 2 Sim. 452.

The case upon this record stands thus: The Spanish government being indebted to certain persons in this country, found it necessary to employ an agent or banker in this country for the purpose of paying those persons; and, to enable their agent or banker to pay the claimants on them, they gave to him certain moneys, or means of raising money. Now, in what character did he receive the funds for making the payments? He received them as agent or banker of the Spanish government, with a direction to apply them in a certain way. There is no doubt that, as between him and the Spanish government, he would be bound to apply them in paying the claimants. But if the Spanish government chose to countermand their authority, and to make a new disposition of the funds in his hands, he would be bound to obey that order. So if an individual were to direct his banker to pay an annuity, and the banker were to pay the annuity for a certain time, yet the individual might revoke his order; but the annuitant would not have a right of action against the banker. Suppose that the banker were to fail, would the loss fall on the annuitant? Besides, it appears in this case that there was an alteration in the state of the principal. For in 1823, when the agents first received the funds, the government of Spain was in the hands of the King and Cortes, who had directed the money to be paid to certain persons in this country; and the first dividend was paid under that authority. Between the time of the first dividend being paid and of the second becoming due, a revolution took place in Spain; and the King countermanded that authority, and directed that the creditors in this country who had received the first dividend should not be paid the second dividend out of the moneys in the hands of the agents. Taking the bill and plea together, there was no contract in this case, but mandate only.

But if there was a contract, it was one to which the plaintiff and the other creditors of the Spanish government in this country were not privies; and there is no case where an action for money had and received has lain at law, unless there has been some privity between the plaintiff and defendant. Though there is money sent to an agent to pay, and there is a mandate commanding him to pay, still, if there is no privity between him and the party who is to receive the money, an action will not lie. In addition to those circumstances, the creditor must show that the agent undertook and pledged himself, to the creditor, to hold the money to his use. Here there was no such pledge or undertaking, either express or implied; and, therefore, the discovery would be useless. Williams *v.* Everett;[1] Scott *v.* Porcher;[2] Yates *v.* Bell;[3] Taylor *v.* Lendey;[4] Stewart *v.* Fry;[5] Grant *v.* Austen.[6]

[1] 14 East, 582. [2] 3 Mer. 652. [3] 3 B. & A. 643.
[4] 9 East, 49. [5] 7 Taunt. 389. [6] 3 Price, 58.

The fact of one of the dividends having been paid does not give the plaintiff a right to have the second dividend paid to him. The defendants were acting as the agents of the Spanish government when they paid the first dividend; but, as to the second, the Spanish government directed them not to pay it. Yates v. Bell.

Sir *E. Sugden* and Mr. *Bethell*, for the plaintiff. No such plea as the one now on the record can be supported. The bill is a mere bill of discovery. In Hindman v. Taylor, Lord Thurlow, C., says: "The whole remedy being, upon the face of the transaction, at law, the question is, whether you shall, by plea, bring the whole merits on here." The object of the defendants in filing this plea is to bring before this court the question of liability on the contract; so that this court would have to try the right of action upon the imperfect evidence which the plea, and the statements in the bill which are admitted by the plea, afford, instead of leaving it to be tried in a court of law, to which tribunal it properly belongs. The plea states a variety of circumstances which, it is contended, deprive the plaintiff of his right of action; the answer to it is that the question whether such is the effect of those circumstances, ought to be tried at law. Gait v. Osbaldeston;[1] Leigh v. Leigh.[2] The plaintiff may have it in his power to produce other evidence in support of his action, and the discovery sought may form a link only in the chain. If the defendants are satisfied that because the authority of the agents was revoked the plaintiff cannot maintain his action, why do they withhold from him that evidence which may be given as well by an answer as by a plea.

The defendants might have pleaded some general, abstract fact, which would at once have put an end to the right of action; but this plea consists of three distinct defences, and is nothing but an informal and imperfect answer, and it concludes with that which is matter of demurrer. It states that the agency of the defendants was revoked; it denies any appropriation, on the part of the defendants, of the proceeds of the second set of certificates, to the payment of the second half-year's dividend, and it alleges want of privity between the plaintiff and the defendants; but it brings forward no extrinsic fact to show that there was such want of privity. That being matter apparent on the face of the bill, is matter of demurrer. It is of the essence of a plea to allege something extrinsic to the bill. Lord Redesdale says that the object of a plea is to reduce the cause to a single point, in order to save the expense of parties and protect a defendant from a defence which he ought not to be compelled to make.[3] Whit-

[1] 5 Madd. 428. [2] 1 Sim. 349. [3] Treat. Plead. 295.

bread v. Brockhurst.[1] This plea brings forward a cloud of circumstances, as to which it would be necessary to examine a great number of witnesses, and, therefore, it puts the parties to all the expense and trouble which it ought to be the object of a plea to prevent. After the plea, the defendant goes on to deny almost every fact alleged in the bill in the shape of averment, and thereby he admits the necessity of putting in an answer in support of his plea.

The annulling of the decree might have relieved the defendants, if they had not incurred an obligation to the different creditors; but, having incurred that obligation, and having, as the plea admits, the money in their hands before their authority was revoked, they are bound to fulfil their engagements.

In Mendizabel v. Machado, Sir John Leach, V. C., says: "If the King of Spain himself," &c.[2] Therefore the ground upon which the court proceeded there was that the discovery would be against conscience; but that is not the ground upon which we rely.

There is an allegation in the bill which the counsel for the defendants have not adverted to, namely, that the defendants, having received the money for the express purpose of paying the dividends, applied it for their own purposes. That allegation is admitted by the plea, and takes the case out of all the authorities that have been relied upon on the other side. It is obvious that, upon proof of that allegation, the plaintiff would be entitled to recover in assumpsit.

The language of the receipt, which is set forth in the plea, confirms the construction put upon the contract by the plaintiff. For by that receipt it appears that the defendants were to hold the surplus only after payment of the dividends, at the disposal of the Spanish government.

The VICE-CHANCELLOR. In this case several circumstances are stated in the bill as the ground of an action, which the plaintiff has commenced; and the bill is filed for a discovery to support that action. The defendants, by pleading to the bill, admit that the action is maintainable upon the case stated in the bill, otherwise they would have demurred; but they have stated facts by way of plea, for the purpose of showing that, by reason of those facts, the action is not maintainable. It has been decided that a negative plea may be filed to a bill of discovery; but I apprehend that a plea, in order to be good, whether it be affirmative or negative, must be either an allegation or a denial of some leading fact, or of some matters which, taken collectively, make out some general fact. Now, in this case, the right to discovery is founded upon a variety of circumstances, which are noticed at the end of the plea. First of all it sets forth a set of facts which have the effect of confessing and avoiding the principal matter which is alleged

[1] 1 Bro. C. C. 404. [2] 1 Sim. 77.

in the bill, namely, a certain authority from the government of Spain. Then it, secondly, avers that there was no agreement to appropriate the moneys in question; and, thirdly, that neither the plaintiff nor any of the other holders of the bills or certificates were privy to the agreement of July, 1823. It appears to me, therefore, as it did at the time when the plea was argued, that the plea is not single, but multifarious, and that for that reason it must be overruled.

There is a further observation which has occurred to me upon this case. I apprehend that, if a right of action is founded upon a variety of circumstances put together, a plea, which attempts to show that the action cannot be maintained, by confessing and avoiding some of the circumstances and denying the rest, cannot be good, for this reason, that it, in effect, takes to pieces all the several single grounds which, put together, are asserted as the grounds upon which the action is maintainable; and, by confessing and avoiding some, and traversing others, it reduces the plaintiff to the necessity of proving, in a court of equity, without a discovery, that he has a right to support that action. But, upon the face of this bill, it is averred, and therefore is admitted by the plea, that the action at law cannot be maintained without a discovery. I think, therefore, that, upon that ground, as well as because the plea is multifarious, it must be overruled.

The Vice-Chancellor, after overruling the plea, was applied to, by the counsel for the defendants, for leave to amend the plea: and his Honor granted the application.

The amended plea was, in substance, as follows: That these defendants, who were merely such agents and for such purposes as specified in the agreement, dated the 18th of July, 1823, never did, nor did any or either of them, in any manner, engage, contract, promise, undertake, or agree with or to the plaintiff, or with or to any person or persons holding or entitled to, or who, at any time or times, held or was or were entitled to the certificates of 580,000 dollars and 24,000 dollars of *rentes* in the bill mentioned, and therein called the first set of certificates, or any or either of them, or with or to any person or persons on his or their, or any of their account or behalf, that these defendants or any or either of them had received, possessed, held, negotiated, sold, or disposed of, or should or would receive, possess, hold, negotiate, sell, dispose of, or apply the certificates of 125,000 dollars of *rentes* in the said bill mentioned, and therein called the second set of certificates, or any or either of them, or the produce or proceeds of such last-mentioned certificates, or any or either of them, or any part of such produce or proceeds, to or for the use or benefit, or on the account of, or in trust for the said plaintiff, or any person or persons holding or en-

titled to, or who, at any time or times, held, or was or were entitled to, or who might hold or be entitled to, the said first set of certificates, or any or either of them, as moneys specifically or otherwise appropriated to pay the whole or any part of the first year's interest thereon, or any or either of them.

The arguments in support of the amended plea were to the same effect as those in support of the plea as it was originally filed.

The VICE-CHANCELLOR said that the amended plea contained two propositions, one of which asserted that the defendants were such agents and for such purposes as were specified in the agreement of July, 1823; and the other denied that the defendants did, in any manner, engage, contract, or promise, &c., so that the plea admitted one of the allegations in the bill, whereas it was the object of the plea to show that the defendants ought not to give any part of the discovery sought; and that, therefore, the plea was wrong in point of form, and must be overruled.

SCOTT v. BROADWOOD.

BEFORE SIR JAMES L. KNIGHT BRUCE, MARCH 7, 1846.

[*Reported in* 2 *Collyer's Chancery Cases*, 447.]

THE bill alleged that Sir Andrew Chadwick, since deceased, being seised in fee and in the actual possession and receipt of the rents of a certain piece of ground on the east side of New Street, and west side of Hopkins Street, St. James's, Westminster, with certain buildings erected thereon, demised the same, by an indenture dated the 2d June, 1766, to Francis Johnston, for sixty years, from Midsummer then last past, at a yearly rent of £40.

The bill further stated that Sir A. Chadwick, being seised in fee and in the actual possession and receipt of the rents and profits of certain houses situate on the south side of Broad Street, Westminster, had demised those houses for divers terms of years, in each of which sixty years remained unexpired on the 24th December, 1767.

The bill then contained an allegation similar to the foregoing, relative to certain houses in Cock Court and other streets adjacent.

There were also similar allegations as to other property.

The bill then alleged that Sir A. Chadwick, being so seised, and being in such possession and receipt of rents under the various leases, died on the 22d March, 1768, intestate as to his real estate, leaving his nephew, Thomas Chadwick, his heir-at-law.

The bill then, after deducing the title of the plaintiff from Thomas Chadwick, alleged that the premises comprised in the several demises or leases, as also the indentures of demise or lease, had come into the possession of the defendant Henry Broadwood, who held, or was entitled to the premises for the residue of the several terms aforesaid, but the plaintiff had been unable to discover when the defendant obtained such possession, or from whom, or through whom he derived his title to the said leasehold premises.

And the bill, after stating that the plaintiff had commenced an action of ejectment against the defendants Broadwood and his partners, but that the plaintiff was unable to go to trial without a discovery of the contents of the leases, prayed that the defendants might make a full and true discovery of all and singular the matters and things afore-

said, in order that the plaintiff might give the same in evidence at the trial of the action, and that the indenture of lease of the 2d June, 1766, and such other indentures of lease as aforesaid, might be brought into court and deposited with one of the Masters, and that the plaintiff might be at liberty to use and give in evidence the same, or any or either of them, at the trial of the said action in support thereof.

The defendant Broadwood, by an order of the court, had leave to plead two pleas in bar of this bill, namely, a plea of adverse title, and a plea of the Statute of Limitations, and to support such pleas by such averments, by way of answer, as might be necessary.

The defendant accordingly pleaded, first, that at the death of Sir A. Chadwick, at the house mentioned in the bill, one Sarah Law, claiming to be his heir-at-law, became seised for an estate of inheritance, in possession, of the premises before specified; and the plea went on to state a conveyance by Sarah Law to John Taylor, a fine with proclamations levied by Sarah Law and Taylor, and non-claim, within the legal period, by Thomas Chadwick (then under no disability), or any person claiming through him, and ultimately a conveyance of the fee to the defendants for valuable consideration, through persons deriving title from Sarah Law and John Taylor.

The defendant pleaded, secondly, in the following form:—

And this defendant further, as to so much of the said bill as seeks any discovery against this defendant, touching the said several hereditaments hereinbefore particularly described and mentioned to consist of, &c. [Here followed a particular statement of all the lands before specified, viz., those comprised in the lease of the 2d June, 1766, the houses in Broad Street, and the houses in Cock Court], being part of the messuages, hereditaments, and tenements in the said plaintiff's bill mentioned, and as touching so much of the said bill as prays that the said indenture, &c. [following the prayer of the bill], this defendant doth plead in bar, and for plea saith, that, by a certain act of Parliament, &c. (stat. 3 & 4 Will. 4, c. 27), it was, amongst other things, enacted, &c.[1] . . . And this defendant doth aver that at the time of the decease of the said Sir Andrew Chadwick hereinbefore mentioned, the said houses on the south side of Broad Street aforesaid, mentioned to be respectively in the occupation of [A. and B.], and the said houses in Cock Court aforesaid, and the said houses on the east side of New Street aforesaid, mentioned to be in the respective occupations of [C. and D.], were respectively holden under the said Sir Andrew Chadwick by the respective tenants thereof, at will, or from year to year, and the said house on the south side of Broad Street aforesaid, mentioned to have been late in the occupation of one E., was then vacant

[1] The plea here sets forth the substance of the 2d, 8d, 9th, and 84th sections of the act referred to. — Ed.

or empty. And this defendant doth aver that the right (if any) of the said Thomas Chadwick in the said bill named, to the said last-mentioned houses and premises, first accrued on the decease of the said Sir Andrew Chadwick, and that he, the said Thomas Chadwick, or any person or persons claiming under him, or on his behalf, did not within twenty years, or at any other subsequent time after the decease of the said Sir Andrew Chadwick, make any entry or distrain on, or bring any action or suit in respect of, the said last-mentioned houses and premises; and that the said Thomas Chadwick, or any person or persons claiming under him, or on his behalf, was or were not at any time within the space of twenty years after the decease of the said Sir Andrew Chadwick, or at any subsequent time, in the possession of, or in the receipt of, any rent or rents, or other profits, from any of the tenants or occupiers of the said last-mentioned houses and premises, or any of them, or otherwise in the possession or receipt of the rents and profits of the same premises, or any of them. And this defendant doth further aver that the said Sarah Law, and the person and persons successively deriving title and claim through or under her, including therein this defendant, hath and have been respectively from the time of the decease of the said Sir Andrew Chadwick hereinbefore mentioned, up to the time of the commencement of the said action of ejectment by the said plaintiff (being, as the fact is, for a period of twenty years and upwards), and this defendant now is, in the actual possession of, or in enjoyment and receipt of, the rents and profits of the said last-mentioned houses and premises, without any action or suit, or any interruption or disturbance by the said Thomas Chadwick, or any person or persons whomsoever deriving or claiming title under him, save and except the said action of ejectment commenced, and the said bill filed by the said plaintiff. And this defendant doth also aver that, to the best of his knowledge, information, and belief, the said Thomas Chadwick was not, at the time of the decease of the said Sir Andrew Chadwick, or at any other subsequent time, under any disability whatsoever.

And as to the said piece or parcel of ground, messuage, or tenements, hereditaments, and premises comprised in the said indenture of lease of the 2d June, 1766, the said houses and premises on the south side of Broad Street aforesaid, mentioned to have been on the 24th December, 1767, in the respective occupations of [F. and G.], the said houses and premises on the east (in reality on the west) side of Hopkins Street aforesaid, and the said houses on the east side of New Street aforesaid, mentioned to have been on the 24th December, 1767, in the respective occupations of [H. and I.]; this defendant doth aver that, to the best of his knowledge, information, and belief, the said several last-mentioned hereditaments and premises were, at the time of the decease of the said Sir Andrew Chadwick, respectively holden by the

several persons hereinbefore named as the tenants or occupiers thereof, or by some other person or persons, by virtue of leases in writing, and in and by each of such leases, a rent amounting to upwards of the yearly sum of 20*s.* was respectively reserved. And this defendant doth also aver that the rent reserved by each of such respective leases as aforesaid was upon and from the time of the decease of the said Sir Andrew Chadwick aforesaid, namely, the 22d of March, 1768, received by the said Sarah Law, and the person or persons successively deriving or claiming to derive title through or under her, for her, his, and their own absolute use and benefit; and that she, the said Sarah Law, and such person or persons as last aforesaid, did claim to be entitled to such rent respectively, in reversion, immediately expectant on the determination of each such respective lease. And this defendant doth also aver that the said Sarah Law, and the person and persons successively deriving title, and claiming through or under her, including therein the defendant, hath, and have been respectively from the aforesaid time of the decease of the said Sir Andrew Chadwick, up to the time of the commencement of the said action of ejectment by the said plaintiff, as in the said bill mentioned (being, as the fact is, for a period of twenty years and upwards from the decease of the said Sir Andrew Chadwick), and this defendant now is in the actual possession of, or in the enjoyment and receipt of the rents and profits of the said hereditaments and premises, without any action or suit, or any interruption or disturbance by the said Thomas Chadwick in the said bill named, or any person or persons deriving or claiming title under him, save and except the said action of ejectment commenced, and the said bill filed by the said plaintiff. And this defendant doth further aver that, to the best of his knowledge, information, and belief, no payment in respect of the rent, or of any part thereof respectively reserved by any such respective lease as aforesaid, or in respect of the said last-mentioned hereditaments and premises comprised in any such respective leases as aforesaid, or in respect of any such hereditaments and premises, or any part or parts thereof, hath at any time since the decease of the said Sir Andrew Chadwick, namely, the 22d March, 1768, been made to, or received by the said Thomas Chadwick, in the said bill named, or any person or persons whomsoever on his behalf, or for his use, or to any person or persons whomsoever deriving title, or claiming through or under him, the said Thomas Chadwick, or for, or on the behalf, or for the use of such person or persons as last aforesaid. And this defendant doth further aver that from the time of the decease of the said Sir Andrew Chadwick to the time of the commencement of the said action of ejectment by the said plaintiff, is upwards of twenty years, that is to say, seventy-seven years and upwards. And this defendant doth likewise aver that, to the best of his

knowledge, information, and belief, the said Thomas Chadwick was not at the time of the decease of the said Sir Andrew Chadwick under any disability whatsoever. And this defendant doth likewise aver that the said plaintiff, or any person under whom he claims, or any other person or persons for his or their, or any of their use, or in trust for him or them, or any of them, was not nor were within twenty years next before the commencement of the said action of ejectment in the possession or receipt of the rents or other profits of the same last-mentioned premises, or any part thereof.

And this defendant doth plead the said act of Parliament, and such receipt of rent, and such possession and enjoyment by the said Sarah Law, and the person and persons deriving title or claiming through or under her, including therein this defendant as aforesaid, and such non-entry and non-receipt of rent by the said Thomas Chadwick, or any person or persons deriving title or claiming under him as aforesaid, and the several matters hereinbefore severally and respectively averred, to so much of the said bill as is hereinbefore pleaded to. And this defendant humbly prays the judgment of this honorable court whether he ought to make any further answer to so much of the said bill as is hereinbefore pleaded to.

And this defendant not waiving his said plea lastly hereinbefore contained, but wholly relying and insisting thereon, in aid and support of so much as relates to the said houses and premises on the south side of Broad Street aforesaid, which were in the occupation of [A. and B.], and formerly of one [E.], and in Cock Court aforesaid, and on the east side of New Street aforesaid, which were in the occupation of the said [C. and D.], denies that the same, or any of them, were or was, at the time of the decease of the said Sir Andrew Chadwick, holden under or subject to any lease or leases thereof, or any agreement or agreements for a lease or leases thereof respectively, for any term or terms for years thereof, but, on the contrary, all but the one hereinafter mentioned were respectively held by the tenants thereof at will, or from year to year, and the house and premises late E.'s was vacant or empty.

And this defendant not waiving his said pleas, or either of them, but wholly relying and insisting thereon, respectively, for answer to so much of the residue of the said plaintiff's bill, not hereinbefore pleaded unto or answered, as he, defendant, is advised is in anywise material or necessary for him to make answer unto, answering saith, that as to the several matters and things stated, alleged, charged, or inquired after, in and by the said bill, and in the several interrogatories therein in, or about, or respecting the several hereditaments described in the said bill as follows, viz. [here was specified the other property mentioned in the bill], this defendant is wholly ignorant, &c.

The pleas now came on for argument.

Mr. *Teed* and Mr. *Schomberg*, in support of the pleas, cited (more particularly with reference to the plea of the statute) Cholmondeley *v.* Clinton,[1] Chadwick *v.* Broadwood,[2] MacGregor *v.* East India Company.[3] They also contended that the principles acted upon by Lord Thurlow, in Hindman *v.* Taylor,[4] were no longer recognized.

Mr. *Rolt* (with whom was Mr. *Welford*), for the bill. There is no authority for saying that, generally, pleas such as these can be put in to a bill of discovery. This court cannot generally stop the legal remedy. In order to do so, you must show by your plea that the discovery sought would be useless upon an ejectment. It is a question whether Lord Thurlow was not right in saying that the whole is a matter of law. The state of the proceedings to which the discovery is to be applied is the state at law, and not the state in equity. The effect of the plea will be to withdraw the subject from the court of law. Yet the plaintiff may be able to produce something at law which may avoid this plea. One material circumstance to prove will be the seisin of Sir Andrew Chadwick. The plea does not say he was not seised; it contains no averment one way or the other. Why is the plaintiff not entitled to discovery on that subject? There are strong grounds for insisting that the plea of a legal bar is not admissible to a bill of discovery. Leigh *v.* Leigh.[5]

The cases of Robinson *v.* Lubbock[6] and Baillie *v.* Sibbald[7] were also referred to.

The VICE-CHANCELLOR. I can conceive cases in which, to a bill of discovery filed by a plaintiff at law in aid of an action brought by him against the defendant, it would not be a good plea to allege matter of sufficient legal defence to the action. But I am satisfied that there may be cases in which, to a bill of that kind, it may be a good plea to allege matter of sufficient legal defence to the action.

I am of opinion that the present bill is so framed that the second plea is a good plea to the extent to which it goes, and must be allowed with costs. It cannot, therefore, be necessary to give any opinion as to the first plea for any other purpose than the purpose of costs; but whether that plea is bad or good, I think (subject to hearing the defendants' counsel in reply, if it is wished) that there should be no costs as to it on either side.

I am not sure that this bill might not have been demurred to, but I do not decide that question; it is not necessary.

The counsel for the defendants having declined to argue the question of costs,

The VICE-CHANCELLOR allowed the second plea with costs, but made no order as to the first.

[1] T. & R. 107. [2] 3 Beav. 308. [3] 2 Sim. 452. [4] 2 Bro. C. C. 7.
[5] 1 Sim. 349. [6] 4 Sim. 161. [7] 15 Ves. 185.

SMITH v. FOX.

BEFORE SIR JAMES WIGRAM, V. C. JANUARY 21 AND 26, 1848.

[*Reported in* 6 *Hare*, 386.]

THE defendants, Fox and Southam, as the solicitors of the plaintiff, took proceedings to get in a sum of money due to the plaintiff on mortgage; and with this view, on the 29th of June, 1829, they gave notice to the mortgagor that the power of sale contained in the mortgage deed would be exercised. In pursuance of this notice, the mortgaged property was sold. In the year 1837, the representatives of the mortgagor brought their bill for redemption, impeaching the sale, on the ground that due notice had not been given according to the terms of the mortgage deed; and a decree for an account and redemption was made in January, 1841. The report in the cause was made in March, 1844; and the cause was shortly afterwards settled on the footing of the decree and the report. In November, 1846, the plaintiff brought an action on the case against the defendants for negligence in the conduct of the proceedings in 1829; and he filed his bill of discovery in aid of the action, alleging that, by the culpable neglect of the defendants in giving an insufficient notice, the sale had been invalid, and he had sustained a loss of £2000 and upwards. Southam died after the bill was filed, and Fox demurred.

Mr. *Rolt* and Mr. *Archibald Smith*, in support of the demurrer, contended that the right of the plaintiff to recover, in respect of the negligence complained of, was barred by the Statute of Limitations. The cause of action accrued not in the year 1841, when the decree in the redemption suit was made, — nor in 1844, when the suit was terminated, and the damage actually suffered; but in the year 1829, when the alleged breach took place upon which the action was founded. This was the case in assumpsit: Short *v.* M'Carthy;[1] and also in case: Howell *v.* Young.[2] The Statute of Limitations being a defence at law, was also a defence to the bill of discovery: Baillie *v.* Sibbald,[3] Scott *v.* Broadwood,[4] Gait *v.* Osbaldeston,[5] Mendizabel *v.* Machado.[6]

[1] 3 B. & A. 626.
[2] 5 B. & C. 259.
[3] 15 Ves. 185.
[4] 2 Coll. C C. 447.
[5] 1 Russ. 158.
[6] 1 Sim. 68.

Hindman v. Taylor[1] has not been followed: Robertson v. Lubbock,[2] Wigram's Points on the Law of Discovery, p. 43, ed. 2. And the

[1] 2 Bro. C. C. 7. An attempt has been made in another place (Tr. on Discovery of Evidence, 48) to state the reasoning upon which the case of Hindman v. Taylor may be reconciled with the other authorities. The proposition that a plea, which is a legal bar to an action at law, is in no case a defence to a bill of discovery in aid of that action, can scarcely be attributed to Lord Thurlow, before whom, in other cases, the right to sue at law was discussed as the test of the right to discovery in equity. It is sufficient to mention Rondeau v. Wyatt, 8 Bro. C. C. 154, where, upon the argument of a plea to a bill of discovery, Lord Thurlow was required to consider, and formed his judgment upon, the authorities at law on the question whether a contract for the purchase of flour, to be delivered at a future time, was within the Stat ute of Frauds. There is no doubt that if it appears by the bill, or can be shown by plea, that the plaintiff has no right or remedy at law (as in Smith v. Fox, above), equity will not give a discovery, which, as Lord Thurlow said, in Rondeau v. Wyatt, "would be merely impertinent." On the other hand, the plea, upon which the defence rests at law, is not necessarily a good plea to the bill of discovery. Suppose the case of a bill of discovery in aid of an action of trover, to which the defendant has pleaded not guilty (Martin v. Hampton, Choyce Cas. in Chan. 123), it is obvious the same plea could not be allowed in equity; and perhaps it may be difficult to suggest a case where the plea at law is the general issue, or where the plea at law will require to be established, or may be controverted, by evidence, in which the same plea can be used as a bar to the discovery. It is submitted that the judgment of Lord Thurlow, in Hindman v. Taylor, must be considered and explained with reference to the case before him. The circumstances of that case are not very fully reported, nor does it appear whether the action at law had actually been brought. It would rather seem that proceedings at law had not been commenced. If the plaintiff had in that case brought assumpsit on the contract, and the defendant had pleaded the general issue, with the intention of relying upon the erasure of the signature of the parties from the original instrument, as disabling the plaintiff from recovering upon the contract, which, perhaps, he might have done (Powell v. Devett, 15 East, 29; Master v. Miller, 4 T. R. 320), the discovery would, on the ordinary rule of the court, have been given. If, instead of pleading the general issue, the defendant had pleaded specially the cancellation of the original instrument (Davidson v. Cooper, 11 M. & W. 778), or had pleaded a subsequent contract in satisfaction of the former, the court must have given the discovery, or tried the legal question on the facts disclosed upon the bill and plea. The plaintiff, it appears, required, among other things, a discovery from the defendant with regard to the money which had been deposited with the bankers, in pursuance of the original agreement. Lord Thurlow, in overruling the plea, refused, as preliminary to a determination of the question whether the plaintiff was entitled to the discovery in aid of his action, to try what would be the legal effect of the new circumstances upon the original contract. Whether the degree of difficulty, in a legal question, may be so great that the court would not try it upon the argument of a plea or demurrer to a bill of discovery; or whether, in refusing to try the question, the court would give the discovery and leave the party to insist, in the action at law, upon the matter which he had sought to use in equity to protect himself from discovery (as in Hindman v. Taylor); or whether, refusing itself to try the legal question, the court of equity would order the plea or demurrer to stand over, and

[2] 4 Sim. 161.

defence may be raised by demurrer, as well as by plea. Bampton v. Birchall.[1]

Mr. *Romilly* and Mr. *Shebbeare*, for the bill. The question is, whether, in the case of an action brought and a bill filed for discovery pertinent to the action, this court will try the right of action upon demurrer to the bill of discovery. The judgment of Lord Thurlow, in Hindman v. Taylor, has not been overruled, and is not inconsistent with principle. Leigh v. Leigh.[2] This is the first case in which the Statute of Limitations has been set up as a defence by way of demurrer to a bill of discovery. Assuming, however, that what would be a bar at law to the action is also a bar in equity to the discovery, and that the defence is one which may be raised by demurrer, the objection to the suit cannot be sustained; for the cause of action did not arise until the damage accrued, in 1841, and, consequently, the statute has not intervened. An action could not be brought until the misconduct was known, and the misconduct could not be known until the court had decided that the proceedings with regard to the sale were invalid. Can it be said that the injured party is to be without remedy, because, from the slow progress of a suit, or from other causes, the misconduct of a solicitor is not known until more than six years after the negligence occurred? In assumpsit the cause of action arises on the breach of promise. Battley v. Faulkner;[3] Short v. M'Carthy;[4] Tanner v. Smart.[5] In trespass, also, the cause of action arises at the time when the wrongful act is done, and does not wait until a special damage accrues, although such special damage may afford the measure of the damages to be given. Fitter v. Beal.[6] The distinction between such a case and an action on the case, founded on a consequential damage, is expressed by Sir William Blackstone in Scott v. Shepherd:[7] "If I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over it and is hurt, an action on the case

send a case for the opinion of a court of law, before it determined the question of the right to discovery, — has not been decided. There is no instance of the latter course having been taken on the argument of a plea or demurrer to a bill of discovery; and it would be dilatory and circuitous. The doubts which have been expressed as to the authority of the case of Hindman v. Taylor certainly arise, if the language of Lord Thurlow, in his judgment on that case, be taken abstractedly, without reference to the circumstances to which he was then applying the rule of pleading there laid down; but taking the judgment in connection with the subject with which the court was dealing, it may, perhaps, be said, in the words of Sir J. Leach (1 Sim. 78), that that case, when it is carefully considered, will be found consistent with the doctrine that a plea that the plaintiff has no interest in the subject of the suit is a good plea to a bill of discovery.

[1] 5 Beav. 77. [2] 1 Sim. 349. [3] 3 B. & A. 288.
[4] *Ubi supra.* [5] 6 B. & C. 603. [6] Salk. 11.
[7] 2 W. Black. 892.

only lies, it being a consequential damage; but if, in throwing it, I hit another man, he may bring trespass, because it is an immediate wrong." This is plainly a case of consequential damage, which did not arise until the decree of 1841 was pronounced, and the cause of action was thereby made complete. The effect of the statute in many cases depends on the form of the action. Inglis *v.* Haigh.[1] The case of Howell *v.* Young was not in conformity with earlier authorities. Saunders' Reports, by Williams, p. 63 *e*, n. (*m*). But the plaintiff in a bill of discovery is not required to show that the action at law which he proposes to bring must be sustainable upon authorities which cannot be controverted. If the cases at law be merely doubtful, or if it be, as Lord Thurlow has said, "a measuring cast,"[2] this court will not refuse to give the discovery. The effect of allowing the demurrer will be to preclude the plaintiff from obtaining the decision of the court of law upon the legal question; and rather than such a consequence should follow from withholding its assistance, the court would order the demurrer to stand over, and direct a case for the opinion of a court of law, as in Spry *v.* Bromfield.[3]

The VICE-CHANCELLOR. Two questions were argued upon the hearing of the demurrer in this case, — one, whether, according to the dates of the transactions alleged to have taken place by the bill, the Statute of Limitations is a bar to the action; and the other, whether, if the first question be answered in the affirmative, there is still a case upon which the plaintiff is entitled to discovery.

Whatever question might, at one time, have existed upon the point, it is now clear that the defence that the Statute of Limitations is a bar to the suit may be raised by demurrer. There is no doubt but that is so where relief is sought in equity; and I apprehend that it is the same where discovery only is sought in aid of relief at law. It is immaterial, with a view to this question, whether the relief be in equity or at law; the point to be determined upon the demurrer, in both cases, is simply whether the plaintiff is entitled to an answer or not. So, also, whatever question there might at one time have been, upon the reasoning of Lord Thurlow in Hindman *v.* Taylor, as to the point raised as to the defence in equity being the very point to be tried by the action, it is now settled that a party, applying to this court for discovery in aid of an action, in which the defendant may, by plea or demurrer, show that the plaintiff is not entitled to recover, may raise the defence by plea or demurrer in equity. The justice of the case requires that the defence to the discovery should be open to

[1] 8 M. & W. 769.

[2] Rondeau *v.* Wyatt, 3 Bro. C. C. 154. See also Thomas *v.* Tyler, 3 Y. & C. 255.

[3] 12 Sim. 75.

the defendant in equity; and my recollection of the unreported observations of the present Lord Chancellor in Hardman v. Ellames, upon the case of Hindman v. Taylor, satisfies me that such is the rule, in his opinion, as well as in that of other judges; though they have not expressly overruled the case of Hindman v. Taylor.

The question, then, is, whether the defendant is barred by the Statute of Limitations, or when, in fact, the cause of action arose as alleged by the bill. If it arose when the act of negligence occurred, the statute is a bar; but if it did not arise until the plaintiff sustained the injury, the case is not within the statute. According to the case of Howell v. Young,[1] the cause of action arose not later than June, 1829, when the insufficient notice was given. Since the argument of the demurrer, I have endeavored to ascertain whether that case is considered to be law in Westminster Hall. I find it is so considered; and the demurrer must therefore be allowed.

[1] 5 B. & C. 259.

THOMAS v. TYLER.

IN THE EXCHEQUER. NOVEMBER 21, 1838.

[*Reported in* 3 *Younge & Collyer*, 255.]

THE bill stated that the plaintiffs, John Thomas and Jonathan Chapman, had for many years carried on the business of Italian merchants in Broad Street, in the city of London; and in the course of their business, and on or about the 20th of September, 1836, sold to one Richard Crofts, of Coventry, a quantity of silk, in payment for which Crofts accepted a bill of exchange dated 20th September, 1836, at five months, for £497, which bill was drawn by the plaintiffs, and made payable at the banking-house of Sir James Esdaile & Co. That the defendants, Tyler and Warner, are the public officers of the Coventry Union Bank, and manage and direct the affairs thereof, and that Sir James Esdaile & Co. are the London agents of that bank. That Crofts employed the Union Bank as his bankers; and that before the above-mentioned bill became due, namely, on the 21st February, 1837, he applied and requested them to remit to Sir James Esdaile & Co. the sum of £479 15*s.* 3*d.*, for the purpose of meeting such bill, so far as the same would extend; that at the time of making such application, Crofts, as a security and inducement to the Coventry Banking Company to remit such sum, deposited with them a bill of exchange, bearing date the 20th of February, 1837, drawn by Crofts upon, and accepted by, Messrs. Leaf, Coles, & Co., payable three months after date, for the sum of £485 15*s.*, and indorsed by Crofts; that together with such bill Crofts delivered a note in writing, directing the Coventry Banking Company to advise the plaintiff's bill for £497, due at Sir James Esdaile's; that thereupon the banking company, in consideration of such deposit, assented and agreed to such order, request, and direction of Crofts, and then undertook and faithfully promised Crofts, and well knowing the plaintiffs to be the holders of the bill, faithfully promised the plaintiffs, that they would advise the bill, and that they would remit the said sum of £479 15*s.* 3*d.*, in order that the same should be at the banking-house of Messrs. Esdaile & Co., and

that the same should be paid to the plaintiffs, the then holders of the bill, on the 23d of February, 1837, when it should be there presented by the plaintiffs for payment. That, notwithstanding such promise, &c., the said banking company did not remit to Esdaile & Co. the sum of £479 15*s.* 3*d.*, or any other sum, for the purpose of taking up the above bill; by reason whereof, when it was presented for payment, it was dishonored, and returned unpaid to the plaintiffs by Sir James Esdaile & Co., there then being no effects of Crofts at their house to pay the same; and that the bill remained in the hands of the plaintiffs overdue and unpaid. That a fiat in bankruptcy, on the 8th of March, 1837, issued against Crofts, under which he was duly found and declared a bankrupt; and that, on the 23d of May, 1837, the bill of exchange so deposited, drawn by Crofts on Leaf and Co., for £485 15*s.*, was duly taken up, and the amount received by the Coventry Banking Company, and applied by them to their own purposes. That they held, at the time this deposit was made with them, deeds and other securities more than sufficient to cover the balance due to them from Crofts. That on the 13th of March, 1837, the plaintiffs commenced an action against the defendants, as such public officers, to recover from the said company the sum of £479 15*s.* 3*d.* so paid to them under the circumstances stated; to which action the defendants appeared and pleaded, amongst other matters, that they did not assent or agree to such order, request, and direction of Crofts; and further, that he did not deliver or deposit with them the said bill of exchange as a security or inducement to them to remit the sum of £479 15*s.* 3*d.* to Sir James Esdaile & Co.; to which pleas the plaintiffs replied; that the cause was set down for trial for the sittings after Easter term, and that the defendants caused the same to be made a special jury cause. That Crofts was subpœnaed, and would have appeared at the trial as a witness for the plaintiffs, and would have proved by his evidence the whole of the matters stated concerning the bill for £497, and that the banking copartnership did assent and agree to the order, &c., of Crofts; and that he did deliver and deposit with the company the second-mentioned bill of exchange as a security to them to remit the sum of £479 15*s.* 3*d.* to Esdaile & Co.; but that, after the cause was set down for trial, and after Crofts had been subpœnaed, and before the plaintiffs were able to try the cause, Crofts died, without having at any time revoked the order, and the plaintiffs were unable then to prove the matters stated by any other evidence, and the plaintiffs made default in proceeding to the trial of the cause. That after the plaintiffs had made the above default, the defendants moved for judgment as in case of a nonsuit, but that the court refused to grant such judgment, unless the defendants would produce to the plaintiffs the note so delivered to

the banking company by Crofts, at the time of depositing the bill for £485 15*s*., or allow the plaintiffs to inspect the same, which they had always refused to do. That the defendants threatened and intended to move the Court of Common Pleas for judgment as in case of a nonsuit, pursuant to the statute; and at other times they threatened and intended to bring the cause to trial by proviso, and in pursuance of such intentions had already given notice of trial by proviso to the plaintiffs; but the plaintiffs were unable to go to trial, and could not prove the matters aforesaid, without a discovery on oath of the same from the defendants; and the plaintiffs insisted that they were entitled to such discovery, and to an injunction restraining the defendants from proceeding to move for judgment as in case of a nonsuit, and from proceeding to the trial of the cause by proviso, until they should have sufficiently answered the bill; but the defendants sometimes pretended that the company did not assent to the order, &c., as stated.

The bill then charged that the defendants did so assent, &c., and that the defendants ought to set out the balance, if any, which was due at the time of the deposit of the bill to the banking company, by Crofts; that a conversation took place between Crofts and the defendant Tyler at the time when the bill was deposited, when Tyler expressly undertook in such conversation to advise the bill for £497; that the bill for £485 15*s*. was entered in the books of the Coventry Banking Company as deposited for the purpose of meeting the bill for £497; and that the defendants and banking company have now, or had lately in their possession, &c., divers accounts, books of account, letters, &c., relating to the above matters, and particularly the paper-writing referred to as having been left by Crofts with the banking company at the time of the deposit of the bill for £485 15*s*.

The bill prayed that Tyler and Warner might make a full and true disclosure and discovery of the above matters, and, in the mean time, be restrained by injunction from proceeding further to apply for judgment as in case of a nonsuit, or from taking the cause to trial by proviso.

To this bill the defendants demurred, on the ground that the plaintiffs had not, by their bill, made such a case as entitled them, in a court of equity, to any discovery from the defendants as to the matters contained in the bill.

Mr. *Simpkinson* and Mr. *G. Richards*, for the demurrer. The bill alleges that the defendants faithfully promised the plaintiffs that they would advise their bill, and remit the funds to Sir James Esdaile & Co. to meet it; and that, upon the failure of that undertaking, the plaintiffs brought their action of assumpsit against the defendants, in support of which action they now file their bill for discovery. But the

question is, whether assumpsit will lie upon such an undertaking as this. Upon the face of the bill, the consideration for it moved from Crofts, and not from the plaintiffs; and there are several authorities to show that assumpsit cannot be maintained where the consideration has moved from any other than the party bringing the action. Bourne *v.* Mason;[1] Crow *v.* Rogers;[2] Price *v.* Easton.[3] The consideration must move from the party who claims the benefit of the undertaking. [The LORD CHIEF BARON. It is more correct to say that the party who claims the benefit must be privy to the consideration. It is not always true that the consideration coming from another person is an objection to the party who claims the benefit of the contract recovering.] The agreement to remit was made with Crofts alone, and was for Crofts's sole benefit. The bankers agreed with Crofts to put £497 into Esdaile's hands; they did not do so, and Crofts was damnified. That is all that appears by the bill. In Williams *v.* Everett[4] the same attempt was made as in the present case, and failed. [The LORD CHIEF BARON. The plaintiff will perhaps say that the direction from Crofts to the bankers was an appropriation of the second bill.] That cannot be, because it was not due till the following May. Besides, the plaintiffs only say that the bankers undertook to provide the funds, and, to induce them to do so, Crofts indorsed to them this bill. There is no statement of appropriation. Another point is, that the plaintiffs should have alleged by their bill that they intend to prosecute the action. They not only omit to do so, but seek by this prayer to restrain the defendants from exercising their ordinary legal rights, in taking the cause to trial by proviso. If we are entitled to judgment as in case of a nonsuit, there is no justice in preventing us from taking the cause to trial by proviso. No such thing, however, has ever been known as a prayer for time to proceed at law to judgment.

Mr. *James Russell*, and Mr. *Terrell*, contra, were stopped by the court.

The LORD CHIEF BARON.[5] As to the objection which has just been urged by Mr. *Richards*, I cannot think that the plaintiffs are not entitled to what they ask by their prayer. It appears to me that they have just as much a right to stay the proceedings at law before discovery as to have the discovery itself. If a verdict is had in an action tried by proviso, the case is set at rest and cannot be discussed again, though certainly a nonsuit is no bar to another action. Here the plaintiffs were going to trial when Crofts died, and the death of Crofts, as they allege, made it necessary for them to make default of trial and have this discovery. The defendants then moved for judgment as in

[1] 1 Ventr. 6. [2] 1 Str. 592.
[3] 4 B. & A. 433. [4] 14 East, 582. [5] Lord Abinger. — ED.

case of a nonsuit, but the court refused the rule, unless the defendants produced to the plaintiffs a certain note. The defendants then gave notice of proceeding to trial by proviso, when the plaintiffs filed this bill, and obtained an injunction to restrain the defendants, and to obtain a discovery in aid of the action. Now, even a court of law, according to its usual practice, postpones the trial by proviso until the next term after default made. It appears to me, therefore, that the object of the plaintiffs being to obtain discovery, it was quite a legitimate mode of proceeding for them to seek to prevent the defendants from forcing them to trial without such discovery. I think, in such case, they had as great a right to stay the defendants, as the defendants would have had, under like circumstances, to stay the plaintiffs.

We now come to the material question, whether the bill discloses sufficient grounds at law to entitle the plaintiffs to a verdict. If I were called upon to decide the question here in the first instance, I should take time to consider it. But the rule, I apprehend, is, that a party seeking discovery in equity at his own expense, is not to be barred of that privilege by the mere suggestion that he has no remedy at law. That, I apprehend, is the rule, unless the case is clear of all doubt. It was said by Lord Thurlow, in Fytche's case,[1] the plaintiff pays for his discovery, and why should he not have it? The case where he is not entitled to it is where the case at law is manifest. Is this so clear a case? I am far from thinking it free from doubt or unfit for argument; and shall, therefore, not prevent the party from having the benefit of the opinion of a court of law. I do not dispute the principles of a case which has been cited, and which certainly comes near to the present case, that of Williams *v.* Everett.[2] That case was brought into court in consequence of a previous decision which is very like it, namely, De Bernales *v.* Fuller.[3] There, Puller, who was a merchant in London, and who had not a very good account at his banker's, had accepted a bill of which De Bernales was the holder. The bill was payable at Fuller's banking-house. Shortly before the bill became due, Puller took the requisite amount of cash to the bank, and said to the clerk, this is to pay De Bernales. The clerk took the money, but the bank refused to pay De Bernales; upon which De Bernales brought his action of assumpsit against the bank, and ultimately recovered on the ground that the banking-house took the money to pay that particular bill, thereby creating a privity of contract between De Bernales and the Fullers on which the action could be founded. Williams *v.* Everett followed upon that case, and it was there attempted to show the same sort of privity between the plaintiff and the defendants. If

[1] Bishop of London *v.* Fytche, 1 Bro. C. C. 98.
[2] 14 East, 582. [3] Id. 590, n.

I remember right, the court bestowed much consideration upon it, and the case of De Bernales v. Fuller was cited upon that occasion. The court, however, took this distinction between the two cases. In the one case, Puller was present when the direction to appropriate was given, and the banker ought to have immediately signified his dissent from that direction. In the other case, the bill came from abroad; and what was the banker to do with it? In Puller's case, the banker was considered, under the circumstances, to have assented to the appropriation. In Williams v. Everett, no such assent was given; but, on the contrary, the banker expressly refused to appropriate the bill. No doubt, however, it was his duty, if he did not appropriate it, to return it; and if it had been money paid to him instead of a bill remitted him, the question would have arisen whether the case of De Bernales v. Fuller did not apply, so as to authorize each of the individuals for whose use the money was paid to bring assumpsit for its recovery.

Look at the present case. The defendants admit that they are the bankers of Crofts, and that Esdaile is their London agent. Now, it is the practice of some country banks to compel their customers to accept bills payable at their agents in London, although those customers may have no account there. I do not know, therefore, whether the defendants and Esdaile do not stand on the same footing in regard to the first bill. Now, upon the face of the record, I take the facts to be that the defendants, knowing that Crofts was the acceptor of a bill of which the plaintiffs were the holders, took from Crofts, with the knowledge of the plaintiffs, a specific bill of exchange, with a direction from him to apply it to meet this specific bill of the plaintiffs. The bill having thus come to the defendants' hands, we may suppose (I say this to meet the observation that the second bill was not due till afterwards) that the defendants agreed to supply cash to take up the first bill. But, however this may be, they make no objection to Crofts' application; they receive the bill with the written direction that it is to be applied to the particular purpose which has been mentioned, but they fail to apply it to that purpose. Now suppose that first bill to have been made payable at their own house instead of at Esdaile's. That would have been the case of De Bernales v. Fuller. The step which invites discussion is the fact of Esdaile being the defendants' agent. If you ask me what my opinion is upon that point, all I say is, that it is considerable matter for argument, and may lead to distinguish this case from a class of cases some of which have been cited. Upon these grounds, I think I ought not to prevent the plaintiffs from trying the case at law. *Demurrer overruled.*

JOHN GUN AND WIFE *v.* PRIOR AND OTHERS.

BEFORE LORD THURLOW, C. DECEMBER 16, 1785.

[*Reported in Forrest*, 88, *note.*]

THE bill stated that Ann Allen died in 1762, seised in fee of certain lands, as heir of Benjamin Uphman, leaving Edward, her husband, surviving her, who thereupon became tenant by the courtesy, and continued in possession till the 17th of December, 1769, when he died; and that upon his death, Hannah, the wife of the plaintiff John, became entitled to the premises, as heir-at-law of Ann Allen, she being the only child of Hannah Bean, who was the daughter of Hannah Uphman, the only sister of Benjamin Uphman: that immediately upon the death of Edward Allen, the defendants took possession of the estate, under pretence that Edward Allen had devised it to them: and the bill charged that the defendants well knew that the plaintiff Hannah was the heir-at-law of the said Ann Allen; and as an evidence thereof it charged that on the 1st of August, 1782, the defendants went to the plaintiff Hannah, and offered her a sum of money if she would release her right to the premises, which she refused; and that they twice afterwards again applied to the plaintiff Hannah for the same purpose; and the last time offered her £300 to release her right. It likewise charged that the defendants pretended that there was some outstanding mortgage term of the premises: the bill therefore prayed that the defendants might account for the rents and profits of the premises received by them; and that they might deliver up possession of the premises to the plaintiffs: and in case it should appear that any term was vested in the defendants, that they might assign it to the plaintiffs; and that they might deliver up to the plaintiffs all title-deeds and writings relating to the premises in their custody.

To this bill the defendants pleaded that they were advised that the plaintiffs laid claim to the premises in the bill mentioned in right of the plaintiff Hannah, who in the bill stated herself to be the first cousin and heir-at-law of Ann Allen: whereas the defendants said that the plaintiff Hannah was the daughter of Hannah Brown, who was the daughter of Elizabeth Beane, who was the daughter of Hannah Grover,

by John Grover, her second husband; which Hannah Grover, before her said intermarriage with the said John Grover, was the wife of Benjamin Uphman, by whom she had issue Benjamin Uphman, in the bill named, who was the father of Ann Allen; and therefore the plaintiff Hannah was second cousin only of the half-blood to the said Ann Allen; and the defendants averred that the plaintiff Hannah was not in any other manner related or of kin to the said Ann Allen than as before mentioned; all which matters and things the defendants pleaded in bar to the plaintiffs, and demanded the judgment of the court, whether they should be compelled to make any other answer to the plaintiff's bill.

Mansfield and *Spranger*, in support of the plea. This bill is brought in the character of heir-at-law, and it is competent to the defendants to plead that the plaintiff is not heir-at-law; which destroys his title both to the discovery and to the relief which he prays. Pleas of this kind (though not exactly the same in specie) have been allowed by the court, as in Winn *v.* Fletcher, 1 Vern. 473,[1] where a bill was brought by a man in the character of administrator: the defendant pleaded that he was not administrator; it was objected that this was a negative plea; but the court allowed it, and said that it was a good plea in abatement at law. In the Practical Reg. 326, mention is made of pleas to the person, and it is said that it may be shown that the plaintiff or defendant is not such a person as alleged, as feme-sole, heir, executor, or administrator; and is not therefore to sue or be sued as such, for the matters in question; and in Ord *v.* Wilkinson, 30th of October, 1773, the bill was filed by the plaintiff as administrator of Ann Salkeld; the defendant pleaded that Ann Salkeld, to whom the plaintiff alleged he was administrator, was at the time of filing the bill alive, and was, as the defendant believed, still living at Paris. The plea, upon argument, was allowed;[2] and they urged that it would be attended with very great

[1] "The plaintiff entitles himself as administrator; the defendant pleads the plaintiff is not administrator. It was objected this is a negative plea. *Per Cur.* Allow the plea: it is a good plea in abatement at law." — Ed.

[2] "30th of October, 1773, Ord *v.* Wilkinson. The matter of the plea coming on this day to be argued, and the said plea being opened, and the same being, for that the said defendant says, that Ann Salkeld in the bill mentioned, to whom the plaintiff by his bill alleges that he hath obtained letters of administration, and by virtue of which, and under pretence of his being one of the heirs-at-law of the said Ann Salkeld, he hath commenced and prosecuted this suit, was, at the time of the filing of the plaintiff's bill, and the defendant believes is still alive at Paris, in the kingdom of France; and therefore the defendant demanded the judgment of the court, whether he shall be compelled to answer the plaintiff's bill? Upon debate of the matter, &c., his Lordship held the said defendant's said plea to be good and sufficient; and therefore did order that the same do stand and be allowed." From the original order.

inconvenience if any person, who has no pretensions to an estate, might, by merely alleging that he was heir-at-law, compel the true owner to discover his title, and put him to all the expense and trouble of a tedious litigation.

Scott and *Richards*, for the plaintiffs, insisted that a negative plea could not be good. It is the business of a plea to confess the matter in the bill, and then avoid it by alleging some collateral fact which puts an end to the equity claimed by the plaintiff; a plea cannot consist of a denial of any fact stated in the bill. The case of an administrator is very different from this, because a plea in abatement of the suit of the administrator, or executor, is only an abatement *pro hac vice;* the plaintiff may take out administration, or prove the will, and by that means entitle himself to the relief prayed for; but if this plea were good, it must be an everlasting bar to the plaintiffs. It is incumbent on the defendant to answer the charges of the bill, which imputes to them the having treated with the plaintiff Hannah, as heir-at-law of Ann Allen, and having offered her money to release her right.

Mansfield, in reply. This is not a negative plea; it is a plea of facts, namely, that the plaintiff Hannah was the daughter of Hannah Brown, who was the daughter, &c., &c.

Lord Thurlow, Chancellor, said, that if such a plea as the present was good at all, it must be as a plea in abatement; though he seemed very much to doubt whether it would be good, even in that shape. With respect to pleas to the person, he said he was not aware that they had gone further than the case of excommunication, and other disabilities of that kind; that the case of administrator was new to him, and he did not doubt, if the plea were looked into, that it would turn out to be a plea in abatement. It might be necessary for the plaintiff to see deeds and writings relative to the estate, in order to make out his title as heir; and it was not to be endured that to such a bill the defendant should plead that the plaintiff was not heir. Considering this as a plea of facts, it could not be a good bar; for notwithstanding those facts, the plaintiff might possibly be heir; she might be so by the father's side; for here the pedigree is traced wholly through the maternal line. If not considered as a plea of facts, then it was a negative plea. At any rate, the defendant ought to have answered the charge of their having treated with the plaintiff as heir-at-law.

He therefore disallowed the plea.[1]

[1] This report is said to be from Lord Redesdale's notes. See 2 Bro. C. C. (Belt's ed.) 145, note. — Ed.

SAME CASE.

[*Reported in* 1 *Cox*, 197.]

BILL stated the plaintiff to be heir-at-law of Ann Allen, who died intestate, seised of the premises in question, which thereupon descended on plaintiff; that defendants had in their possession the several title-deeds of the said premises, and praying that they might have them delivered up. There was a charge in the bill (as evidence of the plaintiff's title as heir-at-law) that one of the defendants came three several times to the plaintiff and offered him £300 to give up his right or claim as heir.

To the whole of the bill the defendants pleaded in bar that plaintiff was not heir-at-law of the said Ann Allen, for that he was only second cousin of the half-blood (stating the pedigree particularly), and that he was not *in any other manner related to the said Ann Allen.*

Mansfield and *Spranger*, for the plea.

Although no case appears in the books in point to the present, yet it seems to bear so strong an analogy to a plea that plaintiff is not administrator (he having filed his bill in that right), that it can hardly be doubted that the present plea is good. That it is a good plea as to an administrator, *vide* Pract. Reg. 276 (which indeed mentions *heir*); Winn *v.* Fletcher, 1 Vern. 473; and Ord *v.* Wilkinson, in 1773, where to a bill filed by a plaintiff, as administrator of Ann Salkeld, it was pleaded that Ann Salkeld was still alive, and therefore plaintiff was not administrator, and the plea was allowed. But, independent of any authority, the inconvenience attending the disallowing this plea would be sufficient to induce the court to make the precedent. It would enable any person who chose to state himself to be an heir-at-law to compel an answer as to any question he might think fit to ask about an estate; whereas a plea might possibly destroy all right in him to come into this court, and show that all further proceedings must be altogether useless.

Scott and *Richards*, contra.

The business of a plea is to confess the facts stated in the bill, and avoid them by some collateral fact; but here the bill states the plaintiff to be heir of Ann Allen, and the plea denies it, which cannot be. There is no precedent for such a plea as this, and the case of an administrator is certainly very different; for that fact must turn upon the production of a single instrument, whereas the question of being heir-at-law may involve great variety of matter, and go to a much greater extent; but in the present case, the charge made by the bill of

the offer of £300 is a very material fact, and ought certainly to be answered in support of the plea.

LORD CHANCELLOR said that this plea would not be good as a plea in bar, though it might be so as a plea in abatement. If that had been the only objection, he would have given the defendants an opportunity of amending their plea. But he had great doubts whether it was a case analogous to that of administrator, for the reasons mentioned by Mr. *Richards* in the argument; however, in the present instance, he thought the charge of the offer of £300 was a fact which ought to be answered, and upon that ground disallowed the plea.

His Lordship seemed to have some doubt whether the plea went far enough to show that in all events the plaintiff could not be heir-at-law to Ann Allen; for although it appeared to be so by the pedigree as stated by the plea, yet it did not follow that if it had been stated further back it might not have appeared otherwise: and the averment that the plaintiff is not heir, seems to be made as a deduction only from those premises; in answer to which it was observed that the plea went on to say that the plaintiff "was in no other manner" related; with which his Lordship seemed satisfied, and disallowed the plea on the ground aforesaid.

SAME CASE.

[*Reported in* 2 *Dickens*, 657.]

THE bill was for a discovery and production of title-deeds; and the plaintiff, by the bill, stated himself to be heir-at-law. The defendant pleaded to the bill: the plea was, that the plaintiff was not the heir-at-law. It was said that it was analogous to a plea that one who sets himself up for an administrator is not administrator, and the Practical Register was cited, page 276; Wynne *v.* Fletcher, 1 Vern. 473; Ord *v.* Wilkinson, in 1773. Plea, that the person whom the plaintiff pretended to represent was living; the plaintiff replied to the plea, and entered into proof in support of his right, not of his limited right, but of his general right; so in this case, it was said the plaintiff ought first to prove his right to come into this court, before he hath the discovery prayed; for otherwise any person might, by stating he was heir-at-law, or representative (without being so), come into this court, and make a person discover his title, of which another might avail himself.

LORD CHANCELLOR. Heir or not heir is a point in issue in the cause, which the court will not determine upon a plea; if disproved, having no title, his bill will be dismissed, and he will pay the costs, and therefore overrule the plea.

NEWMAN v. WALLIS AND ANOTHER.

BEFORE LORD THURLOW, C. HILARY TERM, 1787.

[*Reported in 2 Brown's Chancery Cases*, 143.]

THE bill set forth that Caleb Cotesworth, M.D., seised of freehold and copyhold estates, by will dated the 30th of November, 1724, devised the same to Susannah, his wife, her heirs and assigns, for ever, and died, without revoking his said will, the 16th June, 1741; Susannah the wife survived him about eleven hours, and died intestate. The plaintiff claimed the estates as heir-at-law of Susannah, stating that at the time of her decease John Newman, his father, was her heir, who died in 1758, leaving William, the plaintiff's elder brother, his heir, who died without issue and intestate in 1781, by which the title devolved upon him, the plaintiff; and in order to show that his father was heir-at-law to Susannah Cotesworth, he set forth the pedigree thus: that he was son and heir-at-law of William Newman, who was eldest son of Thomas Newman, who was the eldest son of Henry Newman, the brother of John Newman, who was father of another Henry Newman, who was the father of Susannah Cotesworth; and the plaintiff in his bill charged that the defendants claimed as purchasers, for a valuable consideration, of Sarah James, whom they pretend to be the heir-at-law of Susannah Cotesworth, whom the bill charged to be a supposititious child, imposed as the daughter of William Malthus, son of Thomas Malthus, and Susannah his wife, which Susannah was the only daughter and heir of one Dormer Newman, the uncle of Susannah Cotesworth, viz., her father's brother, when in fact Sarah James was not the daughter of William Malthus, nor any ways the heir-at-law of, or related to, Susannah Cotesworth. And the bill went into a detail of the means by which Sarah James was imposed and substituted by a Francis Carter and his wife as the child of William Malthus. To this bill the defendants pleaded "that Sarah James was the heir-at-law of Susannah Cotesworth, without this that plaintiff ever was or is the heir-at-law to the said Susannah Cotesworth, in manner and form as by said bill alleged, all which, &c., defendants do aver and plead in bar of the said bill," &c.

The plea being set down to be argued, came on at Lincoln's-Inn-Hall the 16th of January, 1787.

Mr. *Madocks* and Mr. *Scott*, for the defendants, in support of the plea. Although this is in the negative, it is a good plea. Not administrator is negative, but has been held good. 1 Vern. 473. According to Pract. Register, 326, a plea may show that the plaintiff is not such a person as is alleged, as feme-sole, heir, executor, or administrator; so a purchaser, admitting his purchase, says it is without notice of the plaintiff's equity. In the present case, the plea that the plaintiff is not heir, is the only defence the defendant can have to avoid the discovery. The plaintiff may reply, and then the matter will come in issue, whether the plaintiff is heir or not; if he is not heir, he will have no claim to the discovery.

Mr. *Selwyn*, for the plaintiff. This is a bill for a discovery, brought by the plaintiff as heir-at-law to Susannah Cotesworth, the devisee of her husband, and the plea is stated to be a plea in bar. It is bad in form; for all these pleas which go to the person of the plaintiff are pleas in abatement, not in bar: it would be the first time such a plea ever was allowed. A denial of the facts contained in the bill is matter of answer, not of plea. Here, though there is not a denial of all the facts in the bill, it is a denial of some of them. The bill proceeds upon the ground that Sarah James was a supposititious child; it states that Wallis pretends that she was the heir of Susannah Cotesworth, and traverses that; but a plea must not only traverse facts contained in the bill, it must state a new case out of the bill. A plea of purchase for a valuable consideration does this; it states that there was no notice of the plaintiff's equity; here it only denies what is stated in the bill. A plea that the plaintiff is not heir has never been allowed. There was a case of Gun *v.* Prior before your Lordship the 16th of December, 1785, where, to a bill of the like kind with this, there was a plea in bar that the plaintiff was not a relation, or of kin to the person under whom she claimed. Your Lordship was of opinion that, being a mere negative plea, it could not be allowed. A plea of not administrator is a mere plea in abatement; it is only that the plaintiff has not as yet obtained letters of administration; but the present is a mere negative plea, and ought not to be allowed.

Lord Chancellor. This plea, if it is any thing, is a plea in abatement, where you traverse the plaintiff's right; as, where you plead that he has never administered. A plea in bar is collateral to the bill; a plea in abatement is a traverse; you never traverse in a plea in bar. The difference between this and the plea of purchase for a valuable consideration is this, that in that case the plea introduces what is *dehors* the bill; but this plea does not admit the facts of the bill. The plea must admit the subsequent facts of the bill, suppose the first fact objected by the plea is proved. The question is singly, whether the

court will admit a traverse of the plaintiff's title as heir, as a plea in abatement to the bill, or whether the equity of the court entitles you to a discovery of all the defendant knows of the title. You deny the title which he must have in order to claim, which he cannot do unless he be such; then the question is, whether the plaintiff has or has not a right to have a discovery of your knowledge of his relationship to the person last seised.

Mr. *Madocks*, in reply. If the bill related to proofs in the possession of the defendants, the plaintiff would be entitled to the discovery; so it would be of facts in the knowledge of the defendants; but neither of these is the nature of this bill. Unless the bill be clear as to the discovery required, there is nothing to argue from it. In the present case no ejectment has been brought. What remedy can any man have but this of a plea, against any pretended heir who may come for a discovery, but that he should be obliged first to show himself to be heir? In the case cited, there were facts stated in the bill which ought to have been answered.

Lord Chancellor. The single question is, whether a plea that the plaintiff is not heir, is a plea in abatement. If the nature of a plea be whatever will go in destruction of the plaintiff's title (as, for instance, for an account), it is much to be wished that the plaintiff's title should in every case be established before he has the discovery; it would be a service to justice; but these pleas have a limitation, and it never has been done. In the Practical Register, *not heir* is reckoned among the pleas in abatement; it is a good book, and seldom mentions any thing, even so slightly as it does this, without authority; but no instance is produced where such a plea has been admitted. The defendant never can be admitted to traverse that the plaintiff was heir, but he must swear to all the particulars which amount to show him not to be heir. As in the case of a purchaser for valuable consideration, if the bill charge particulars of notice, the defendant must deny all the circumstances particularly, not generally deny notice; so where the title of heir is set up, it must also be denied. Let it stand over till the second day of term, and in the mean time consider two points: first, Whether you can plead that the plaintiff is not heir as a disability; secondly, Whether you can do so without answering all the particulars by which he makes himself heir. I should think there must be a number of cases where the plaintiff's title must be by heirship; and yet it appears never to have been pleaded in this way. The reason given in Vernon for the plea of not administrator being good does not hold here, for this is no plea at law. If the pedigree be ever so long, you cannot say the plaintiff is not heir, without going through the particulars of his title.

Upon the cause coming on again in term, Mr. *Madocks* cited Fitz-

herbert's and Brooke's Abridgments, title Detinue, to prove that in detinue of charters as heir, bastardy, which in case of heirship is a plea in bar, is a good plea, where heirship is traversed: Booth's Real Actions, 111; which shows that the character in which the plaintiff brings his suit may be traversed. Although by analogy to pleas at law, pleas of this nature are called pleas in abatement in this court, yet, taking the term strictly, there can be no plea in abatement here; for pleas in abatement strictly called such, are pleas to the writ, but in equity there can be no plea to the writ, though there may be pleas in the nature of pleas in abatement. Then its being in the negative is no objection; a negative plea may be good. 1 Vern. 473. If the defendant makes his defence by way of plea, the whole of the bill must be taken to be true, except the part denied by the plea. Pleas in bar certainly go upon a different principle from pleas in abatement.

Lord Chancellor. I have considered the question a good deal, and am clearly of opinion that a party cannot, by a plea of this nature, prevent the plaintiff from having satisfaction from him on the point required. Though the word *heir* is found in the Practical Register, there is not a single instance in all the books of such a plea. I have no comprehension how an objection can be maintained in this shape so as to save an answer. The plaintiff's title to sue is part of his case, which he must make out at the hearing in the same manner as all other points, and if he fail, the consequence will be the same. But if a defendant could, in general, protect himself by such a plea, yet in this case it would be impossible, where the sole object of the bill is the discovery, whether the plaintiff is not heir. The plea, therefore, must be overruled.

Mr. *Madocks* mentioned a case of amending a plea.

Lord Chancellor. With respect to any amendment of the plea, though certainly there have been cases in which the court has permitted pleas to be amended, where there has been an evident slip or mistake, and the material ground of defence seemed to be sufficient, yet the court always expects to be told precisely what the amendment is to be, and how the slip happened, before they allow the amendment to take place. This plea appears to me not only to be bad as it stands, but that it is impossible to form a plea that will save an account.

Plea overruled.[1]

[1] In Hall *v.* Noyes, 3 Bro. C. C. 483, 489, Lord Thurlow is reported to have said (referring to the foregoing decision), that, "though he had held upon a former occasion that a negative plea was bad, he believed he was wrong in holding so; for that wherever a plea will reduce the question to one point, it is admissible." — Ed.

JONES v. DAVIS.

Before Lord Eldon, C. November, 1, 1809.

[*Reported in* 16 *Vesey*, 262.]

The bill prayed an account of stones which had been taken out of the plaintiff's quarry by the Bristol Dock Company, to whom the defendant Davis was treasurer, for the purposes of making a canal, which they were empowered to make under an act of Parliament,[1] providing that maps or plans, describing the line of such intended canal, together with a book of reference, containing a list of the owners and occupiers of such lands and premises as should be wanted for the purposes of the act, should be deposited in the office of the clerk of the peace, in order that the same might be inspected, and that the company should have authority to vary the line of the said intended canal, so that it should not exceed the limits described in such maps and plans and books of reference.

The bill stated that such maps, plans, and books of reference were deposited with the clerk of the peace accordingly; and that the plaintiff was seised of a piece of land, containing a stone quarry not described or noted in the said maps, plans, or books of reference; and that the defendant nevertheless, without the permission or knowledge of the plaintiff, entered upon the plaintiff's land and dug stone out of his quarry; that, as soon as the plaintiff became apprised of such proceedings, he immediately made a complaint to the company, when they apologized to him for thus entering upon his land, and informed him that they should want only 2000 tons of stone. The plaintiff then requested that an account should be kept by the company of the stone which had been or should be raised by the company out of his quarry, and that he should be paid for the same at the fair market price, which the clerks or agents of the company promised should be done; and the plaintiff, relying upon such promise, consented to the defendant's digging stone out of his quarry accordingly; and since the promise was so made to the plaintiff, he was repeatedly assured by

[1] Stat. 43 Geo. 3, c. 140.

the clerks of the company that regular and correct accounts were kept of the stone dug out of the plaintiff's land.

The defendant put in a plea, stating that neither the said Bristol Dock Company, nor the defendant, nor any clerks or clerk, agents or agent, of the said company, on behalf of the said company, ever promised said plaintiff that any account should be kept by the said company of the quantities of the stone which had been or should be raised and taken up by or for the said company out of said plaintiff's quarry, in said bill mentioned; or that he, said plaintiff, should be paid for the same, according to the value thereof, at the fair market price of such sort of stone, or to that effect; and therefore the defendant pleads the matters aforesaid in bar of said plaintiff's said bill, and prays the judgment of the court thereon.

Mr. *Leach*, Mr. *Bell*, and Mr. *Toller*, in support of the plea, argued that the bill in all respects stated a case for the exclusive jurisdiction of a court of law, except the agreement to account for the stones in question. Independently of the suggestion of such an agreement, the bill was to all intents and purposes a declaration in an action of trespass, and no ground is laid for the interposition of a court of equity: but the plea negatives the agreement; a court of equity therefore cannot interfere, but the plaintiff must be left to pursue his remedy at law.

Sir *Samuel Romilly* and Mr. *Johnson*, for the plaintiff, contended that this is no more than a plea of non-assumpsit, putting in issue the whole that is depending between the parties, viz., whether there was any contract under which the stone was taken.

Mr. *Leach*, in reply, said, Lord Thurlow, in the case of Hall *v.* Noyes,[1] retracted his opinion expressed in Newman *v.* Wallis,[2] where the reasoning has no application to this case.

The Lord Chancellor. The original opinion of Lord Thurlow was, that the negative plea was bad, and there ought to be an affirmative plea, stating who was heir. His Lordship changed his opinion afterwards, on the ground that the defendant, though he could prove that the plaintiff was not heir, might not be able to prove who was the heir.

In this case my opinion is, that the plea is bad, since it does not contain a negation of the alleged accounts having been kept by the company. If the accounts had been kept by the company, that would have been evidence before a jury of such an agreement as that stated in the bill; and therefore it was not sufficient for the defendant merely to deny the agreement having been entered into.

The plea was overruled.

[1] 3 Bro. C. C. 483. [2] 2 Bro. C. C. 143.

KINNERSLEY v. SIMPSON and Others.

In the Exchequer. April 24, 1801.

[*Reported in Forrest*, 85.]

The bill stated a marriage between one Edward Williams and Elizabeth Hadley, who was seised in fee of certain premises; and that upon that marriage Edward Williams entered into possession in right of his wife, and continued in possession till her death, upon which the estate descended to her heir-at-law: that Elizabeth Williams left no issue: that her father had only two daughters, Mary Hadley and herself: that Mary married William Kinnersley, now deceased: that William Kinnersley and his wife had four children, three of whom died without issue; the other, William Kinnersley the younger, married Hannah Body, and afterwards died, leaving the plaintiff his eldest son, by his said wife; "so that the plaintiff, in manner aforesaid, became, and now is, the heir-at-law of the said William Kinnersley the younger, Mary Kinnersley, John Hadley, and Elizabeth Williams; that upon the death of the said Elizabeth Williams, the said estate descended to the plaintiff, as heir as aforesaid, or to the plaintiff's said father, or grandfather, both of whom died intestate, and without having done any act to alienate the same."

It then stated that Edward Williams continued in possession from the death of his wife till his own death. That the defendant Simpson, on the death of Edward Williams, or in his lifetime, under some deed executed by Edward Williams, entered into, and has ever since been in possession of the rents and profits of the estate; and that he has in his possession all the title-deeds and writings relating thereto; and that he still keeps possession of them under different pretences. The bill therefore prayed that the defendants might set forth what title they claimed to have in the premises; and that the defendant Simpson might account for the rents and profits received by him, and deliver up possession to the plaintiff, together with all the title-deeds and writings relating thereto in his custody.

To this the defendants, after protesting against the truth of the bill,

pleaded, "that the said complainant is not the heir-at-law of the said Elizabeth Williams in the said bill mentioned and described as the wife of Edward Williams, therein also named; in which right (that is to say, as heir-at-law of the said Elizabeth Williams) the said complainant has by his own showing exhibited his said bill against these defendants, and thereby claimed to be entitled to the premises in question in this cause; and therefore," &c.

Thompson, in support of the plea. This is merely an experimental bill, brought to compel the defendants to disclose their private affairs, and then to take advantage of any casual defect which may be discovered in their title: the defendants may protect themselves from making that discovery, which may involve them in difficulty and expense, by pleading that the plaintiff has no such interest as entitles him to call upon the defendants for a discovery. Pract. Reg. in Ch. 326, and Mitford's Pleading in Equity, 188, and 222, 3. Though in the case of Newman *v.* Wallis, 2 Bro. 143, a plea that the plaintiff is not heir is said to be bad; yet in a subsequent case, Lord Thurlow has decided that where a negative plea reduces the case to a single point, it is good. Hall *v.* Noyes, 3 Bro. 489. Here the only point in question is, whether the plaintiff is heir. The plaintiff, in his replication, may join issue upon the matter contained in the plea, and then go to trial upon that question. Suppose a person to bring a suit in this court against bankers, or other persons engaged in trade, stating himself to be a partner, a plea that he is not a partner would be very proper and necessary; otherwise it would be in the power of any person to call upon a merchant to disclose all the private concerns of his business, which would be highly oppressive and unjust.

Bell, for the plaintiff. The question is, whether to a bill which deduces a regular title from the person last seised, a plea that the plaintiff is not heir, is good. In a case of Gun and *uxor* *v.* Prior and Others, in the Court of Chancery, the bill stated a person seised in fee, and then deduced a regular title from him to the plaintiff; to which the defendants pleaded facts which tended to show that the plaintiff was not heir; the Lord Chancellor said, that if such a plea were good at all, it must be as a plea in abatement. The next case is that of Newman *v.* Wallis in circumstances the same as that of Gun *v.* Prior; the decision was also the same. Then comes the case of Hall *v.* Noyes, in which the only question made was, whether the plaintiff was entitled or not to an account. Admitting that in some cases a negative plea may be good, yet where there are several facts stated in the bill, which together go to make out a title, and such a plea tends to do away the effect of those facts, it cannot be pleaded. King *v.* Holcomb, 4 Bro. 439. If this bill had alleged only the single fact that the plain-

tiff was heir, the defendant's plea might have been good; but where the bill states a variety of circumstances, which together tend to make out a title in the plaintiff, the plea ought to answer specifically each particular fact contained in the bill. So in the case of a partnership, if it be made out by a regular series of facts which tend to show that the plaintiff is a partner, — a general plea that he is not, would not be sufficient; but it must negative the particular facts stated. This principle applies particularly to the case of a pedigree. In a question of legitimacy, the defendant, thinking the party through whom the plaintiff claims illegitimate, may very safely swear that the plaintiff is not heir, and thus preclude him from proving the legitimacy, though he is perfectly capable of doing so.

Thompson, in reply. The case must be taken as it appears upon the face of the bill; and there are no dates or circumstances mentioned in it which render it probable that it should be true. From all the cases cited, it appears that pleas of this nature have been constantly pleaded; and Lord Thurlow, in the case of Hall *v.* Noyes, expressly stated that he had changed his opinion as given in the case of Newman *v.* Wallis. Though in this case the title is made up of several links, yet it amounts upon the whole only to a general assertion that the plaintiff is heir, and it makes no difference whether his title is stated in the first or second degree. If the facts stated in the bill had been questionable by the defendants, it might have been necessary for them to have negatived each specifically; but they are all of such a nature as to be totally out of their knowledge, and, therefore, it is impossible they should be able to contradict them: neither does the case state any thing which shows that the defendants were acquainted with any particular circumstances which the plaintiff could not otherwise discover.

By The Court. This plea does not bring the case to a single point. It would be extremely inconvenient, if, to a bill which states the particular facts upon which the plaintiff founds his claim, the defendants were at liberty to plead generally that the plaintiff is not heir. If an heir-at-law states his pedigree, it is all he can do; and the defendant ought specifically to deny those facts of which he has any doubt.

Plea overruled.

DREW *v.* DREW.

BEFORE SIR THOMAS PLUMER, V. C. JULY 30, 1813.

[*Reported in* 2 *Vesey & Beames*, 159.]

THE bill stated that John Drew, deceased, the husband of the plaintiff, carried on the business of a lighterman and coal merchant at the time of his death, in 1776, John Drew, his son, being his apprentice; that at the end of his apprenticeship, in 1779, the plaintiff and her son agreed to carry on the business in partnership in the proportions of two-thirds to the plaintiff and one-third to the son; and in 1784 the plaintiff admitted her son to an equal participation in the business, which partnership continued until the son's death; that he left the defendants his children and legatees, one of whom, having taken out administration with the will annexed, had taken possession of the effects, and was proceeding to make sale of the leasehold property. The bill prayed an account of the partnership dealings, &c., a sale of the effects and the leasehold estates, an injunction and receiver; charging that John Drew, the son, was intrusted with the sole management of the concern, receiving all the money, and taking leases in his own name.

One of the defendants, the administrator of his father, John Drew, with the will annexed, put in a plea in bar to the discovery and relief prayed, averring that to the best of defendant's belief John Drew, the son, did not at any time in his life agree to be, and was not, a partner with the plaintiff, and did not at any time carry on the business of a lighterman and coal merchant or any other trade or business in copartnership with the plaintiff on the joint account of the plaintiff and the said John Drew, the son, in any shares and proportions whatever.

Sir *Samuel Romilly* and Mr. *Daniel*, for the plaintiff. There is no instance of a plea of no partnership, but this plea is bad in form, not averring positively that there was no partnership. The defendant, being in possession of all the property in dispute, tenders an issue of "belief" only, on which an indictment for perjury would not lie. The averment ought to have been as to his knowledge of the partnership.

The plea likewise covers too much, as the plaintiff has a right to an answer whether John Drew, the son, did or did not serve an apprenticeship to his father. It is in another respect defective; as, if there was no partnership, the plaintiff is entitled to an account against the representatives of John Drew the son, in the character of an agent, intrusted with the management of the concern.

Mr. *Hart* and Mr. *Roupell*, in support of the plea. This bill in its whole frame applies to the single case of partnership, and is properly met by the plea, putting in issue that only important fact.

The averment of "belief" is all that can be required from this defendant, speaking of the acts of others; and, if he had knowledge, swearing to his belief, he would be liable to indictment. The doctrine is thus laid down by Lord Redesdale: "In all cases of negative averments, and of averments of facts not within the immediate knowledge of the defendant, it may seem improper to require a positive assertion." [1]

Mr. *Daniel*, in reply. It is indispensable that information should be averred to. If this were an answer it would be insufficient, the plaintiff being entitled to know whether the defendant has been informed. The plea itself is quite one *primæ impressionis*, the books not affording even one solitary instance of a plea of no partnership.

The Vice-Chancellor. This bill calls for an account of partnership transactions, and in its whole frame is adapted and confined to that object. The plaintiff, therefore, if entitled to the relief she now seeks with respect to separate property intrusted to this individual, and possessed by him as an agent, has by thus framing her bill misled the defendant, who, by this plea denying the partnership, destroys the whole foundation of the relief and discovery prayed. All the late disputed cases upon the point whether a defendant can by answer refuse a full answer, admit that the correct mode of resisting the claim of an account is a plea denying the relation in which it is called for; as in the instance that has been put of an individual setting up a claim as a partner in Child's bank, and in that character requiring an account of all their affairs. In that respect, therefore, the plea is free from objection.

The next objection is to the form of this as a negative plea, with an averment merely to the defendant's belief. The objection to it as a negative plea must depend upon the nature of the suit. The claim as heir, executor, or partner can be met only by a negative plea, if the defendant means to deny the plaintiff's right to that character. It is said that the defendant, speaking only to his belief, is not liable to an indictment for perjury. Where a person is speaking upon his oath to

[1] Ld. Redes. Tr. Ch. Pl. 236.

acts not his own, but done by others, it is sufficient if he states them upon his belief, and more positive averment is not necessary; and an indictment for perjury would lie against a person who, with perfect knowledge that the fact was otherwise, thus denied the partnership; if, for instance, the person so swearing had been employed in the concern, and had kept the accounts between them as partners, he would certainly be liable for perjury, upon clear proof that he had knowledge from which he must have formed a belief of the fact. This is said to be the ordinary form of pleading where the averment is negative: not denying that the defendant might have received such information, but asserting upon his oath that whatever information he might have had, it was not sufficient to produce belief.

The only remaining objection is that the defendant ought to have answered the charge that his father was the apprentice, as that fact might afford some evidence from the probability that he would be taken into partnership; but it is not necessary to answer to every circumstance tending to the point upon which the defendant relies, and tenders an issue by his plea.

This plea, therefore, being correct in form, and sufficient in substance to the bill as framed, must be allowed.

pltfs Husband carried on business as Lighterman & Coal Merchant
his son John, father of defts. was apprentice, at end of apprenticeship
his father having died he and pltf. carried on the business
pltf having 2/3 and John Drew 1/3 interest and later 3 equal shares.
which continued until Drews death. the defts his children
were his legatees, one of whom had taken out administration
with will annexed. and had taken possession of the effects
and was proceeding to make sale of a leasehold property
this Bill prayed for accounting of partnership, & sale of
the effects. injunction & receiver. answer was
a plea in Bar & the discovery & relief prayed, averring the
defts belief. his father had never agreed to be and was not
a partner and did not carry on business with him, his co-partnership
in any shares or proportions whatsoever.
for Bill calls for account of partnership which misled defts who by his
plea denying partnership has destroyed foundation of relief and
discovery.
2nd objection is to form as negative. Ans. with averment as to defts
belief, held. the claim as Heir, if it is a positive can only be met by a
negative plea.
plea was correct in form & sufficient in substance to
bill as framed, and must be allowed.

EVANS v. HARRIS.

BEFORE SIR THOMAS PLUMER, V. C. JANUARY 26, 1814.

[*Reported in* 2 *Vesey & Beames*, 361.]

THE bill stated a parol agreement by the defendant to grant to the plaintiff a lease for twenty-one years of a farm; that Cheese and Davis, the attorneys of the defendant, were to prepare a proper agreement for a lease; and for that purpose the parties met at their office, and Cheese drew up an agreement in writing, dated the 14th December, 1802, to demise to the p'aintiff the farm (except two coppices) for twenty-one years, &c.; that one part only of such agreement was signed by the plaintiff and the defendant, in the presence of Cheese and another person, which was agreed to be left with Cheese and Davis, as the attorneys of both parties, and in order that they might prepare a lease; that "in pursuance and part performance of the said agreement" the defendant, on the 2d of February, 1803, delivered possession to the plaintiff, but that no lease had been executed; and the defendant had brought an ejectment.

The bill charged that an agreement in writing had been entered into; "and as evidence thereof," that Cheese on the execution of it observed that neither party could flinch; that the defendant had frequently admitted that he had agreed to grant the plaintiff a lease, stating specific instances of such admissions; that the defendant had got the agreement out of Cheese's hands, to whom he never returned it, or, if he did, upon Cheese's death, in January, 1812, it again came into the defendant's hands, as executor of Cheese, and that the defendant either now has the same in his custody, or has destroyed it.

The bill prayed a specific performance "of the agreement so made and entered into by and between the defendant and plaintiff as aforesaid," for a lease of the farm (except the two coppices), and an injunction.

The defendant put in a plea, to all the discovery and relief, of the Statute of Frauds, averring that neither the defendant, nor any person by him lawfully authorized, did ever make and sign any contract

or agreement in writing for making or executing any lease to the plaintiff of the premises in the bill mentioned, or to any such effect as by the said bill suggested, or any memorandum or note in writing of any agreement whatsoever for or concerning the demising or leasing or making or executing any lease of the said premises.

Sir *Samuel Romilly* and Mr. *Blake*, in support of the plea. This bill states two agreements, one parol, the other written, varying in this respect, that the latter excepts two coppices. The bill proceeds wholly on the written agreement, to which even the allegation of part performance refers, though ineffectual for that purpose; and the plea directly denying the written agreement, upon which the whole equity of the case rests, all the collateral allegations must fall with it.

Mr. *Hart* and Mr. *Phillimore*, for the plaintiff. The plaintiff alleges a parol agreement and part performance only as part of the *res gestæ*, and as inducement to the charge that a written agreement was prepared and left with the attorney, from whom it was procured, and destroyed. These allegations are not answered by the plea that no agreement was signed; the contrary is asserted upon the defendant's declarations: the question therefore is, whether this plea can exclude all further discovery. The defendant cannot by a plea denying the principal fact evade a discovery of the collateral facts connected with it, which must be met either by plea or answer. Bayley *v.* Adams;[1] Jones *v.* Davis.[2] In the latter case the charge as to keeping the accounts was immaterial, except as evidence of the agreement set up by the bill. In this case the collateral circumstances, disproving the allegation of the plea that no written contract existed, are not denied either by plea or answer.

Sir *Samuel Romilly*, in reply. In the case of a bill for the specific performance of a parol agreement alleging acts of part performance, the defendant must deny those acts of part performance which have been held equivalent to writing; but the part performance is not alleged by this bill as taking the case out of the statute, the bill proceeding on the written agreement. The plaintiff is entitled to a discovery whether such a written agreement ever existed, but he is entitled to no more.

The Vice-Chancellor. The expression in this bill, "in pursuance and part performance of the said agreement," must be understood as referring to the written agreement, which is the last antecedent; and the bill stating circumstances from which the existence of such written agreement is inferred, especially the acknowledgment of the defendant that he had agreed to grant a lease to the plaintiff, I must understand this to be a bill praying a specific performance of that written

[1] 6 Ves. 586. [2] 16 Ves. 262.

agreement, and not of a parol agreement in part performed: in which case the part performance ought to be denied, as raising a substantive ground of relief, which a plea of the Statute of Frauds does not meet. The statute has no application, if the written agreement charged does exist. The question then comes to this, whether, when the relief rests on one material fact, as evidence of which several collateral facts are charged, it is sufficient to deny the substantive fact; or whether a defendant must not discover the collateral facts. To a bill stating corruption of arbitrators, is it sufficient to plead the award merely, leaving the charge of corruption untouched? Can a defendant protect himself by a negative plea from the discovery of a variety of circumstances charged, which, if discovered, would establish the fact in issue? Suppose a bill alleging a partnership, and insisting that the existence of such partnership was made out by a certain document, by settlements of account and admissions: would it be sufficient to plead to such a bill a mere denial that the partnership ever existed, stopping there? I cannot find asserted by any authority that a plea of one solitary fact would enable the defendant to avoid all further discovery. Such a plea would be no better than an answer; but the defendant, if he had taken that course, must have gone further. Why then should a plea have this effect? I cannot conceive a principle on which this plea can be good; nor can I distinguish this case from Jones v. Davis, which is a clear decision by the Lord Chancellor that a mere denial of an agreement, without denying the circumstances charged as making it out, will not do.

This plea must therefore be overruled.

pltf was housekeeper for deft's father, who had promised her as reward for her services. to bequeath her an annuity for her life of £200; and this was promised in presence of sons, who had promised to comply. at opening of will no provision was made. deft had paid pltf for several years £100 pltf charged there was a codicil. pltf's plea deny codicil, held this did not amount as to promise made and plea was overruled.

CHAMBERLAIN *v.* AGAR.

BEFORE SIR THOMAS PLUMER, V. C. NOVEMBER 10, 1813.

[*Reported in* 2 *Vesey & Beames*, 259.]

THE bill stated that for many years previous to 1804 the plaintiff resided in the house of Welbore Ellis Agar, deceased, as housekeeper; and he, being highly satisfied with her conduct, promised to reward her services by granting or bequeathing to her an annuity for life; that accordingly by his will, dated the 25th of June, 1804, a few days previous to his decease, and when he was on his death-bed, he told the plaintiff he had taken care of her, for that he had directed his two sons, the defendants, to pay her an annuity of £200 for her life, and they had promised him to comply with such desire; that on another day, a few days before his death, he in the presence of the defendants told the plaintiff that he had taken care of her, and made her comfortable for life; that the testator requesting the plaintiff to procure him some refreshment, which required her to leave the room, the defendants shortly afterwards came out of the chamber, one of them having in his hand a paper, who, being asked by the plaintiff whether that was his father's will, replied, "No, it is not his will; it is a letter, which is not to be opened until after his death, but it contains what will make you comfortable for life."

The bill further stated that at the meeting after the testator's death for the purpose of opening his will, some surprise being expressed on finding no provision for the plaintiff, the defendants accounted for it by stating that the testator had directed them, as the executors and residuary legatees, to pay her an annuity during her life, which they had promised to do: she was then called in, when the defendants repeated their assurances, alleging, however, that such annuity was not £200, but only £100, which the plaintiff, having no means of proving her own assertion, consented to receive; and the defendants undertook and promised to pay such annuity to her during her life.

The bill further stated that the defendants had proved the will, but not the said testamentary paper or codicil; that they had paid her the

annuity of £100 for several years, but had for some time discontinued it; and charging that the testator made a codicil to his will, or wrote a testamentary paper in the nature of a codicil, wherein he bequeathed to the plaintiff an annuity of £200 for her life; that the defendants had suppressed the same, and not proved it, and that the testator had declared to several persons that he had made a codicil to his will on a separate sheet of paper, whereby he had left several of his friends, and the plaintiff, legacies; prayed that the defendants may be decreed to bring the said codicil or testamentary paper into the proper ecclesiastical court to be proved, an account of the annuity and an investment of stock to answer the future payments.

The defendants put in a plea to the discovery and relief, that the testator did not make or write a codicil to his will, or a testamentary paper in the nature of a will or codicil, wherein he bequeathed to the plaintiff an annuity of £200, or any other annuity, for the term of her life, or for any other term, or directed the defendants, or either of them, to pay any annuity to the plaintiff.

Mr. *Shadwell*, in support of the plea, contended that the bill resting on the single fact that the testator wrote a testamentary paper in the nature of a codicil, giving the plaintiff an annuity of £200 for her life, which paper has been suppressed, the plea expressly negativing that fact is a good bar both to the relief and discovery. Sutton *v.* Earl of Scarborough.[1]

Mr. *Hart* and Mr. *Roupell*, for the plaintiff. The bill is not confined to the right asserted under the codicil, proceeding also on the promise made by the testator to the plaintiff to remunerate her for her past services, in respect of which she is entitled to a discovery. A defendant denying the existence of a deed cannot refuse to answer those circumstances, the answer to which would prove its existence. The bill also alleges that the defendants expressly undertook and promised the testator to pay the annuity, who did not alter his will, but suffered it to stand, relying on that promise. Thynn *v.* Thynn;[2] Reech *v.* Kennegal;[3] and Drakeford *v.* Wilks;[4] and the principle is recognized by the Lord Chancellor in Mestaer *v.* Gillespie[5] and Strickland *v.* Aldridge.[6]

The Vice-Chancellor. The whole object of this, which is a negative plea, is to negative the existence of a will, codicil, or testamentary paper by which any annuity or legacy is given, or the defendants are directed to pay any annuity or legacy to the plaintiff. It is said this plea does not comprehend the whole object of the bill, which is not

[1] 9 Ves. 71. [2] 1 Vern. 296; 1 Eq. Ca. Abr. 380, pl. 6.
[3] 1 Ves. 123. Reech *v.* Kennegate, Amb. 67, s. c.
[4] 8 Atk. 589. [5] 11 Ves. 621. [6] 9 Ves. 516.

simply to effectuate a will, codicil, or testamentary paper, but, beyond that, to establish that, admitting there was no will, codicil, or testamentary paper, the testator, when upon his sick-bed, having promised to make a provision by his will for the plaintiff in requital of her services, imposed that, his assurance to her, as an obligation upon his executors and residuary legatees, and upon the approach of death received their assurance accordingly.

The bill does not state that in consideration of their promise to pay that annuity the testator forbore to insert it in his will, or made the defendants his residuary legatees. In that respect this case does not quite come up to the case determined by Lord Hardwicke and referred to by Lord Eldon, that, notwithstanding the danger of admitting parol declarations, the annuitant or legatee has a clear title to relief upon that species of fraud which consists in not complying with a promise on which the testator relied, where the testator, having come under such an obligation, transfers it to his residuary legatees, who give a positive assurance to fulfil it, the testator relying upon that assurance, and under that confidence abstaining from inserting the legacy in his will. Although that is not expressly stated as the nature of this bill, the question is, whether it does not so nearly approach those cases as to call for an answer. A promise of this nature by the testator is expressly stated; repeated by him in the presence of the defendants, who adopt it in his presence, assuring him that they will fulfil it; after his death representing it as the reason for not providing for the plaintiff expressly by the will, correcting her as to the amount of the annuity, and by that correction admitting that they had promised to pay her £100 per annum, followed by actual payment for several years. Does not all this require an answer? Has not the plaintiff a right to a discovery, for instance, as to this letter, its nature and circumstances, the bill stating it and making it the foundation of relief, either as a testamentary paper or as containing an absolute promise from the testator to pay this annuity, accompanied with the representation of the defendants that it would make her perfectly easy. This plea, merely negativing one part of the bill, and totally silent as to all the circumstances, even regarding that paper on which it tenders an issue, and all the other circumstances alleged which may entitle the plaintiff to relief, though no paper exists that can be properly described as a will, codicil, or testamentary paper, is not the answer the plaintiff is entitled to, and must therefore be overruled.

ARMITAGE v. WADSWORTH.

BEFORE SIR THOMAS PLUMER, V. C. DECEMBER 15, 1815.

[*Reported in* 1 *Maddock*, 186.]

THE bill stated that James Armitage, of, &c., was in his lifetime, and at the time of his death, seised or well entitled to certain freehold estates, situate, &c.; and was also seised or entitled to divers other estates, situate at some other places in England, or elsewhere, unknown to the plaintiff; and being so seised, died on the 26th June, 1812, intestate and without issue, leaving the plaintiff, his second cousin and heir-at-law, him surviving, who, as such, ought to have had possession of all the said James Armitage's freehold estates, and the title-deeds, evidences, and writings belonging thereto; but that, after his death, the defendants, or some person on their behalf, set up a certain paper writing alleged to be the will of James Armitage, and to be duly executed, and entered into and continue in possession or receipt of the rents and profits of the freehold estates of the said James Armitage, for their benefit, and obtained and have possession of the title-deeds, evidences, and writings relating to such freehold estates.

The bill then stated that the plaintiff had discovered that the pretended will was never duly executed, the said James Armitage being, at the time when he is alleged to have executed the same, not of sound mind; and that if the said pretended will was in fact signed by him, the same was fraudulently procured to be signed by him.

The bill then stated applications made to the defendants to account for the rents and profits of the estates, and to deliver up to him the title-deeds, &c., relating thereto; and charged various facts in support of the preceding statements, and that all the said estates having been let by James Armitage on unexpired leases, no action of ejectment could be maintained by plaintiff against the tenants of such estates until the expiration of their respective interests; and that he was therefore unable to proceed with effect at law to obtain possession of such real estates. The bill then insisted that the plaintiff was, under the circumstances, entitled to equitable relief, and prayed a discovery; an issue *devisavit vel non*, or that the plaintiff might be at liberty to

proceed in ejectments; a receiver; an injunction; and that the title-deeds, &c., might be deposited with the Master for safe custody.

To this bill the defendants put in the following plea: "The defendants, &c., for plea unto said bill, say and aver that James Armitage in bill named was, at the time of his death, seised in fee in possession of all the real estates whereof or whereto he was then seised or entitled; and the defendants aver that none of said real estates of said James Armitage were or was let on lease by said James Armitage to any person or persons for any term or terms of years, which were or was unexpired at the time of the death of the said James Armitage, all which matters," &c.

Sir *Samuel Romilly* and Mr. *Heald*, in support of plea. This is an ejectment bill. The only ground of applying to equity in this case is the suggestion of outstanding leases, which prevents the plaintiff proceeding by ejectment at law; but this is expressly negatived by the defendant's plea. A negative plea is good, as a plea, for instance, of no partnership. In Hitchins *v.* Lander, 2d November, 1808, a negative plea, that there was no outstanding mortgage term, was admitted. Title-deeds are not necessary to enable an heir-at-law to recover; he only need show a seisin.

Mr. *Hart*, Mr. *Bell*, and Mr. *Phillimore*, contra. The bill seeks the delivering up of a will obtained by fraud, and of title-deeds, &c. A court of equity may order such a will to be delivered up; nor will it first direct an issue *devisavit vel non*, unless the defendant insists on the validity of the will. The plea, admitting all it does not controvert, must be taken to admit that the will was fraudulently obtained, and that the defendants have the title-deeds, and therefore admits grounds of relief in equity, and that the plaintiff is entitled to have the will and title-deeds delivered up. There is an allegation in the bill that the plaintiff does not know where all the estates of the deceased were situated, and no answer is given to the inquiry on that subject. The plea to be effectual ought to have stated a new substantive direct fact, which shows that the plaintiff is not entitled to any of the relief prayed, which is not the case with this plea. Graham *v.* Graham and Frewin *v.* Lewis, cases recently determined but not reported, are authorities in support of this plea.

Sir *Samuel Romilly*, in reply. The plea only admits facts for the sake of argument, and here the plea, admitting the will to be fraudulently obtained, shows, by denying that there are any outstanding leases, that the plaintiff may assert his rights at law. There are only two cases in which a bill for the delivering up of title-deeds can be supported: 1. Where the title is established at law; 2. Where they are necessary to establish a title at law. In this case the deeds are not necessary to enable the plaintiff to proceed at law.

The VICE-CHANCELLOR. The first point to be considered in this case is, whether the bill contains any matter giving equitable jurisdiction, supposing the passage in the bill relative to outstanding leases were omitted. Without that passage it would be a mere ejectment bill by an heir-at-law out of possession, praying an issue, stating no impediment to the assertion of his right at law, and therefore not sustainable. The bill, it is true, prays the delivery up of deeds, and for the safe custody of them; but it does not state that those deeds are necessary to support his title, or to enable him to proceed at law, nor does he pray an immediate possession of them.

A bill will undoubtedly lie in many cases for the delivery up of title-deeds, and it is a very ancient and important head of equity. Lord Redesdale refers to a case of that description so early as in the time of Edward IV.[1] Where a party is in the possession of property to which the deeds relate, such a bill may in some circumstances be very proper; but where, as Lord Redesdale observes, "the title to the possession of deeds and writings, of which the plaintiff prays possession, depends on the validity of his title to the property to which they relate, and he is not in possession of that property, and the evidence of his title to it is in his own power, or does not depend on the production of the deeds or writings of which he prays the delivery, he must establish his title to the property at law before he can come into a court of equity for delivery of the deeds or writings."[2]

The statement in the bill that there are estates unknown to the plaintiff to which he is entitled, and praying a discovery of them, must have been answered if the bill were for discovery only; but this is not a mere bill of discovery, but for relief also, and if the plaintiff is not entitled to relief he cannot have a discovery.

The bill would have been unquestionably demurrable if it had not stated there were outstanding leases, and upon that single averment the plaintiff's equity alone depends, the prayer for a receiver, &c., being merely consequential to relief. That averment prevented a demurrer. Is, then, this plea, negativing that averment, a good plea? It is a point of some novelty. The case of Graham v. Graham, the brief of which I have seen, is not in point, the prayer of the bill in that case being limited.

It is no good objection to the plea that it is a negative plea. Lord Thurlow expressed an opinion against a negative plea,[3] but he afterwards retracted it;[4] and lately, in Hitchins v. Lander,[5] the present Lord Chancellor held such a plea to be good. That case was very

[1] Tr. Plead. 95, last ed.
[2] Redes. Tr. Plead. 43, last ed.
[3] Newman v. Wallis, 2 Bro. C. C. 489.
[4] Hall v. Noyes, 3 Bro. C. C. 489.
[5] Coop. Rep. 34.

similar to this, it negativing the fact of an outstanding mortgage stated in the bill. Indeed, most of the pleas to the jurisdiction of the court, or to the person of the plaintiff or defendant, and in many other instances, are negative pleas.

What is the proper case for a plea? A plea is a special answer to a bill, or some part thereof, showing and relying upon one or more things as cause why the suit should be either dismissed, delayed, or barred,[1] and must be such as reduces the cause to a particular point. If a demurrer had been filed, together with an answer, it would have been what is called a speaking demurrer, for in the argument of the demurrer you must have admitted the outstanding leases, which would have been fatal to the demurrer. Plummer *v.* May [2] shows that a demurrer in this case, supported by an answer, would have been bad, and that a plea is proper. Unless the plea is good in this case, it must be laid down as a general proposition that if any one point be stated in a bill upon which the court has jurisdiction, though in other respects the remedy is at law, and though a demurrer will not lie, yet a plea cannot be put in to negative that only point which gives jurisdiction! The right to stand in a court of equity is here reduced to one single point, and that equity is denied.

Lord Redesdale puts a case which comes very near the present, expressing himself, however, with great caution. "If," says he, "the jurisdiction was attempted to be founded on the loss of an instrument, where, if the defect arising from this supposed accident had not happened, the courts of ordinary jurisdiction would completely decide upon the subject, perhaps a plea showing the existence of the instrument, and that it was in the power of the plaintiff to obtain a production of it, ought to be allowed, though instances of this sort of plea may not occur in practice. For it seems highly unreasonable that a plaintiff, by alleging a falsehood in his bill, should be permitted to involve a defendant in the expense of a suit in equity, though the bill may be finally dismissed at the hearing of the cause if the defendant answers the case made by it, and enters into his defence at large. No authority, however, occurs to support such a plea." [3] The outstanding leases in this case may be negatived in the same manner as the loss of the deed may be negatived in the case put by Lord Redesdale. An answer would be of no use to the plaintiff; he would be sent to law to assert his legal right. Why then is not a plea allowable to negative the point on which the jurisdiction of this court rests? The bill would have been demurrable but for the statement of outstanding leases, and as the plea negatives the existence of such leases it is good, nor does it stand in need of any averment by answer. *Plea allowed.*

[1] Pract. Reg. 278. [2] 1 Ves. 426. [3] Redes. Tr. Plead. 181, last ed.

SANDERS v. KING.

BEFORE SIR JOHN LEACH, V. C. MAY 2, 1821.

[*Reported in* 6 *Maddock*, 61.]

THIS was a bill for an account of the dealings and transactions of a partnership in which the defendant, King, was alleged to have been concerned; and the defendant King pleaded to the whole of the discovery and relief that he was no partner.

Mr. *Roe*, in support of the plea. It is now clearly established that negative pleas may be filed. A plea that the plaintiff is not heir was allowed by Lord Thurlow; he afterwards altered his opinion. But in Gun *v.* Prior [1] it was established to be a good plea. There are other instances of negative pleas, as in Hitchins *v.* Lander [2] and Armitage *v.* Wadsworth; [3] and Lord Redesdale, in the last edition of his Treatise on Pleading, says, "A plea that the plaintiff is not the person he pretends to be, or does not sustain the character he assumes, and therefore is not entitled to sue as such, though a negative plea, is good in abatement of the suit." [4]

A plea of no partner is therefore good. In Dolder *v.* Lord Huntingfield,[5] Lord Eldon observes, "Modern cases have said that if the defendant denies some substantive fact, which if admitted would give relief, until the truth of that fact is disposed of no further answer shall be compelled;" and in Shaw *v.* Ching,[6] his Lordship seems of opinion that a plea negativing an imputed partnership is sustainable, and that an answer to that effect would be improper. In Drew *v.* Drew,[7] a plea of no partner was held to be good.

If a plea of no partner be good, it cannot be necessary to answer as to any facts charged in the bill in proof of the partnership.

Mr. *Whitmarsh*, contra. It is not sufficient to plead that the defendant is not a partner; he must answer the facts charged in the bill, as evidencing the partnership. Those facts may be essential to the proof

[1] 1 Cox, 197; Forrest, 88, note. [2] Coop. 84. [3] 1 Madd. 189.
[4] P. 187. [5] 11 Ves. 293. [6] 11 Ves. 805.
[7] 2 Ves. & Bea. 159.

of the partnership, and may be only in the defendant's knowledge. In Evans v. Harris[1] it was held that where the relief rests on one material fact, as evidence of which several collateral facts are charged, it is not sufficient to deny, by plea, the substantive fact; the defendant must answer to the collateral facts.

The VICE-CHANCELLOR. Upon this plea the issue between the parties is, whether a partnership did or not exist. And the plaintiff objects that although the defendant does by his plea affirm upon his oath that there was no partnership, yet he is not thereby to deprive the plaintiff of that right to a discovery which the principles of a court of equity give to every suitor as to the matter in issue between the parties; and that, notwithstanding his plea, the defendant is therefore bound to answer to all facts and circumstances stated in the bill, which may afford evidence to disprove the truth of the plea.

It is very singular that this question does not appear ever to have distinctly arisen before.

In the case of Drew v. Drew,[2] Sir Thomas Plumer decided generally that a plea of no partner was a good plea; but the present point was not taken.

It is stated by Lord Redesdale,[3] in the last edition of his treatise, as the result of several authorities, that if a plea in bar be disproved at the hearing, the plaintiff is not to lose the benefit of his discovery; but the court will order the defendant to be examined upon interrogatories to supply the defect. This necessarily refers to discovery as to the other matters of the suit, and not as to the truth of the plea, which is already disposed of; but it marks the care of the court to maintain for the plaintiff that advantage of discovery which is the peculiar province of a court of equity.

The discovery which a court of equity gives is not the mere oath of the party to a general fact, as partnership or no partnership, but an answer upon oath to every collateral circumstance charged as evidence of the general fact.

Where a defendant therefore pleads the general fact as a bar to the whole discovery as well as relief, either the plaintiff in the particular case must lose the equitable privilege of discovery, or some special rule must be adopted by analogy in order to preserve to him that privilege.

If a plaintiff comes into equity to avoid a legal bar, upon the ground of some alleged equitable circumstances, as in the case of a release, the defendant is not permitted to avail himself of his legal defence, so as to exclude the plaintiff from a discovery as to the alleged equitable

[1] 2 Ves. & Bea. 361. [2] 2 Ves. & Bea. 159. [3] P. 244.

circumstances. He may, indeed, plead his release; but he must in his plea generally deny the equity charged in the bill, and must also accompany his plea with a distinct answer and discovery as to every equitable circumstance alleged.

In such a case, the issue tendered by his plea is not the fact of his release, for that fact is admitted by the bill, but the issue is upon the equitable matter charged. Yet inasmuch as the principles of a court of equity entitle the plaintiff to a discovery from the defendant upon the matter in issue, here we find that notwithstanding the defendant pledges his oath that there is no truth in the equitable matter charged, he is nevertheless compelled to accompany his plea by an answer and discovery as to every circumstance alleged as evidence of the equity.

This practice seems to afford a very strong analogy for the present purpose. There the defendant affirms upon his oath that there is no equitable matter to destroy the legal bar of the release; yet he is nevertheless bound to accompany his plea with an answer and discovery as to every circumstance charged as evidence of that equity. Here the defendant affirms upon his oath that there is no partnership; and by analogy it seems to follow that he is nevertheless bound to accompany his plea with an answer and a discovery as to every circumstance charged as evidence of the partnership.

Adopting, therefore, this analogy for the present purpose, it furnishes this rule, that a plea which negatives the plaintiff's title, though it protects a defendant generally from answer and discovery as to the subject of the suit, does not protect him from answer and discovery as to such matters as are specially charged as evidence of the plaintiff's title.

According to this rule, this plea being unaccompanied by an answer and discovery as to the circumstances specially charged as evidence of the partnership, should be overruled; but, being a new case, the defendant must be at liberty to amend his plea.

THRING *v.* EDGAR.

BEFORE SIR JOHN LEACH, V. C. APRIL 15 AND JUNE 1, 1825.

[*Reported in* 2 *Simons & Stuart*, 274.]

THIS was a bill filed by a creditor of Martha Butt, deceased, against her heir-at-law, devisees, and executors, for an account and payment of the plaintiff's debt.

The defendant Edgar, one of the devisees and executors, put in the following plea and answer:—

"To all the discovery and relief sought from or prayed against this defendant, other than and except so much of the said bill as seeks a discovery whether Martha Butt, the testatrix in the said bill of complaint named, was not, in her lifetime and at the time of her death, indebted unto the said complainant in the sum of £215 and upwards, or some other, and what sum, for goods sold, and money lent, paid out and advanced by him to the said testatrix to and for her use, and by her order, and on her account, in her lifetime, or in and by some and what manner and means, and whether the same debt or part and how much thereof, and whether or not with some arrear of interest thereon or upon some part thereof, doth not now remain and is not due and owing to the said complainant from the said testatrix's estate, and as requires this defendant to set forth a list and schedule of all books of account, accounts, receipts, vouchers, deeds, evidences, papers, and writings of or concerning or relating to the hereinbefore mentioned matters and things, or any or either of them, or any parts or part thereof, which are, or at any time or times were in the possession or power of this defendant, and Thomas Dowding and Elizabeth Dowding, two other defendants to the said bill of complaint, or any or either and which of them, or any person or persons for or on account or on behalf of this defendant and the said two other defendants, or any or either and which of them; and in such list or schedule to particularize and distinguish which of the several books of account, accounts, receipts, vouchers, deeds, evidences, papers, and writings are now in the possession or power of this defendant and the said two other defendants, or any or either and which of them, or any and what person or persons for or on the account or behalf of this defendant and the said two other defendants, or any or either and which of them, and to account

for the residue of the said several books of account, accounts, receipts, vouchers, deeds, evidences, papers, and writings, and set forth what is become thereof, and where and in whose possession, and for whom, and for whose account and behalf the same respectively now are, and why, when, where, and to whom, and for what this defendant and the said two other defendants, or any or either and which of them last parted therewith respectively, this defendant doth plead in bar, and for plea saith that the said Martha Butt was not, at the time of her death, indebted unto the said complainant in the sum of £215 and upwards, or in any other sum of money whatever. All which matters and things this defendant doth aver to be true, and is ready to prove as this honorable court shall award; and he doth plead the same in bar to the whole of the said bill, except such parts as aforesaid; and doth humbly demand the judgment of this honorable court whether this defendant ought to be compelled to make any further or other answer to such parts of the said bill as he hath pleaded unto, and prays to be dismissed in respect thereof, with his costs and charges in this behalf sustained. And this defendant not waiving the benefit of his said plea, but wholly relying and insisting thereon, and in aid and support thereof, for answer to the remainder of the said complainant's bill not hereinbefore pleaded unto, or unto so much thereof as this defendant is advised it is in anywise material or necessary for him to make answer unto, answereth and saith that the said Martha Butt was not, in her lifetime or at the time of her death, to the knowledge or belief of this defendant, indebted unto the said complainant in the sum of £215 and upwards, or any other sum, for goods sold and money lent, paid, laid out, and advanced by him to the said Martha Butt to and for her use, and by her order, and on her account, in her lifetime, or in or by any manner or means; and that this defendant hath not nor ever had, nor have, or hath, or ever had the said two other defendants, Thomas Dowding and Elizabeth Dowding, or either of them, to the knowledge or belief of this defendant, nor hath, or have, or ever had any person or persons for or on the account or behalf of this defendant, or (to his knowledge or belief) of the said two other defendants, or either of them, any books of account, accounts, receipts, vouchers, deeds, evidences, papers, or writings of or concerning or relating to the matters and things aforesaid, or any or either of them, or any parts or part thereof. And this defendant denies all, and all manner of combination without this, that," &c.

This plea now came on to be argued.

Mr. *Lovatt*, for the plea, insisted that it was not enough that the plea should deny that any debt existed, but that it was necessary to accompany it by an answer as to the particular manner in which the

bill alleged that the debt was contracted; and that inasmuch as the bill charged that the defendants were in possession of books and papers from which the truth of the matters stated would appear (which included the statement as to the debt), it was necessary also to answer as to the fact whether the defendant had or not any such books or papers.

Mr. *Knight*, for the bill.

The VICE-CHANCELLOR. In the case of Sanders *v.* King, which came before me in May, 1821, I had occasion very fully to consider the form and principle of pleading upon a negative plea. It has happened that this case has not been reported. But I have a correct note of my judgment, which embraces all the material facts of the case.[1]

. . . . . .

To apply these principles to the present case. If the testatrix were not at her death indebted to the plaintiff in any sum of money, then the plaintiff's title to any relief or any discovery upon this bill wholly fails, and the plea of no debt is a full bar to the whole suit, unless the plaintiff has sought from the defendant a discovery of any circumstances by which the existence of the alleged debt is to be established; and then the defendant, although by his plea he may deny the debt, must still answer as to the particular discovery which is thus sought from him. But in order that a defendant may in such a case know what is the particular discovery which the plaintiff requires from him, it is incumbent upon the plaintiff distinctly to state it in the bill; and the common form of doing this is by the plaintiff's charging, as evidence of his title, the particular matters as to which he seeks a discovery from the defendant. Unless the defendant is distinctly informed by the plaintiff what are the particular matters affecting his title as to which he seeks such discovery, the defendant, not knowing what he is expected to answer, is not to answer at all.

The plaintiff in the present bill gives no distinct information to the defendant that he seeks any discovery from him for the purpose of establishing the existence of the debt. The defendant's plea, therefore, of no debt, was a full bar to the whole discovery as well as to the relief; and the defendant as much overruled his plea by answering to the debt as he would have overruled it by answering to any other part of the bill.

If, upon the filing of this plea, the plaintiff had desired a particular discovery from the defendant as to any circumstances by which the debt was to be established, he would have amended his bill, and would have charged, as evidence of his title, the special matters which he required to be answered. *Plea overruled.*

[1] The Vice-Chancellor here read the judgment in Sanders *v.* King, as reported in 6 Madd. 61. — ED.

Plea improperly overruled in this case.

PENNINGTON v. BEECHEY.

BEFORE SIR JOHN LEACH, V. C. APRIL 15, 1825.

[*Reported in* 2 *Simons & Stuart*, 282.]

THE bill was filed for a discovery in aid of an ejectment which the plaintiff had brought against the defendant to recover possession of an estate. It alleged that the plaintiff was entitled to the estate under a settlement made upon the marriage of his great-grandfather in 1717, and that the defendant had frequently admitted to the plaintiff's father that he held the estate during the life only of the plaintiff's father, and that at his death the plaintiff would succeed to it.

The defendant pleaded a conveyance of the estate made to him in 1795 by a person then in the actual possession of it, and who alleged himself to be seised in fee for £600, and averred that he had not, at or before the time of the execution of the conveyance or the payment of the £600, any notice whatsoever of any right, title, or interest of the complainant in or to the premises or any part thereof.

The plea now came on to be argued.

Mr. *Temple*, for the plea.

Mr. *J. Martin*, for the bill, objected that the plea ought expressly to have denied notice of the settlement of 1717, under which the plaintiff claimed, and that it ought to have been accompanied with an answer as to the alleged admissions of the plaintiff's title made by the defendant to the plaintiff's father.

The VICE-CHANCELLOR. The plaintiff insists that notice of the settlement of 1717 would have been constructive notice of the plaintiff's title, but it does not follow that the plea therefore ought specially to have denied notice of that settlement. The general denial by the plea of all notice whatsoever includes constructive as well as actual notice, and is therefore a denial of notice of the settlement. It is not the office of a plea to deny particular facts of notice, even if such particular facts are charged. Here the plaintiff, not anticipating by the bill the defence of the defendant as a purchaser for a valuable consideration, has not charged that the defendant had notice of this settlement, or any notice of his title.

If the plaintiff had meant to have affected the defendant with notice of this settlement, he should have charged generally in his bill that the defendant had notice of his title, and then, as evidence thereof, should have specially charged notice of the settlement. In such case the defendant, notwithstanding the general denial of notice in the plea, would have been bound to answer as to the special notice of the settlement.

With respect to the objection that the plea ought to have been accompanied with an answer as to the admission of the plaintiff's title, alleged to have been made by the defendant, because such admissions would have been evidence that the defendant had notice of the plaintiff's title, the answer is that the plaintiff has not made that case in his bill. For such a purpose also the plaintiff, after generally charging that the defendant had notice of his title, should, as evidence thereof, have specially charged these admissions, which the defendant would then have been bound to answer, notwithstanding the general denial of notice in the plea. *Plea allowed.*

ROCHE v. MORGELL.

IN THE HOUSE OF LORDS. MARCH 15, 1809.

[*Reported in* 2 *Schoales & Lefroy*, 721.]

THE bill was filed by Mary Morgell and others, executors of Crosbie Morgell, against John Roche, stating various money dealings between Morgell and Roche from 1788 to 1794, when Morgell died, and imputing fraud and unfair dealing on the part of Roche, including various overcharges and usurious charges in accounts delivered, and omissions of just credit, imputing fraud and oppression also to Roche in the purchase of an estate called Clonmeen from Morgell, and charging the errors and false charges in the accounts to amount to a very great sum of money; and the bill prayed a general account of the money transactions and other dealings between Morgell and Roche, from the commencement to the end thereof, and particularly to ascertain what was justly due by Morgell to Roche at the time the conveyance of Clonmeen was made to Roche, and that the purchase might be set aside as obtained fraudulently and without a full and valuable consideration, and that the same might be decreed to stand as a security only for what, on taking the account, should appear to have been justly due from Morgell to Roche at the time of the sale: and the bill also prayed an account of the rents, and that the same might be applied as the court should direct, and an account of the value given by Roche to Morgell for certain acceptances, notes, and other securities mentioned in the bill, and how the acceptances, notes, and securities had been paid, and whether any thing remained due or not secured, and all other accounts necessary to ascertain the sum (if any) really due by Morgell to Roche on foot of their several dealings, and that Roche might reconvey premises granted in mortgage to him by Morgell; and general relief.

To so much of the bill as sought a discovery and prayed an account of the dealings and transactions between Roche and Morgell prior to and upon the 27th of May, 1791, and as to all relief and discovery grounded thereupon, Roche pleaded an indenture of release, made and

executed on the 8th of June, 1791, which he set forth verbatim, between Morgell on the one part and Roche on the other part, by which, after reciting that divers accounts and dealings had before, to, and upon the 27th May, 1791, subsisted and depended between Morgell and Roche, as well concerning divers sums of money lent and advanced, and paid, laid out, and expended, as of and concerning and on the foot of divers mortgages, judgments, bonds, bills of exchange, promissory notes, accountable receipts, and other vouchers for money paid and received, and for and respecting interest, exchange, charges, and expenditures in and about and concerning several of the said dealings and securities, and that upon a final settlement made between the parties on the foot of all their said dealings and accounts, from the commencement thereof, to, for, upon, and including the said 27th day of May, 1791, there did appear, and there was to and for the said last-mentioned day a sum of £4437 1*s.* 6*d.*, being the balance of all said dealings and accounts, and of all matters depending between them, owing by Morgell to Roche, over and above all just credits and allowances; and for securing payment of such balance, Morgell had executed two bonds with warrant of attorney, dated 27th May, 1791, and lodged ten paper securities in the account mentioned, amounting to £3243 10*s.* 1*d.*, a copy of which account each party kept: and above and exclusive of a bond with warrant of attorney, dated the 27th November, 1790, executed by Morgell in the principal sum of £9000 as a collateral security for true payment being made to the said John Roche of a further sum of £4500 with interest from the said last-mentioned day, and further secured and mentioned in a deed of assignment, dated on the same day, and executed by Morgell and Thomas H. Royse, to Roche of a mortgage and other securities made by Royse, and affecting his lands and estates in Limerick and Galway, and other property of Royse; and also reciting that all vouchers, receipts, and securities, which were in the hands, power, and knowledge of the parties, of and respecting the said dealings and accounts, and every of them to and for the said 27th May, 1791, save the last-mentioned bond and warrant and deed of assignment, were mutually exchanged and given up by each of them to the other, upon the stating, settling, and adjusting the said account and dealings, and upon ascertaining the said balance of £4437 1*s.* 6*d.* due on the foot thereof: it was witnessed that the said Morgell released to Roche all actions and causes of action, sum and sums of money, trespasses, obligations, accounts, promises, sales, judgments, executions, costs, interest, damages, claims, suits, and causes of suits at law and in equity, and all demands whatsoever from the beginning of the world unto the said 27th May, 1791; and Roche in like manner released Morgell, save the said £4437 1*s.* 6*d.* and two

bonds for securing the same, and the said £4500 and interest, and all debts and securities subsisting for payment thereof, and all actions, &c., for enforcing payment, &c. And Roche averred by his plea that the said indenture was prepared with the consent of, and executed voluntarily and freely by Morgell, and without any fraud or undue practice by or on the part of Roche.

This plea was argued in December, 1798, before Lord Clare, who allowed the plea.

On the 5th of December, 1803, the plea was reargued before Lord Redesdale, who reversed the former order, and ordered that the plea should stand for an answer, with liberty to except; and exceptions were filed accordingly.

But Roche appealing from the said last-mentioned order to the House of Lords, the matter came on to be heard before the House in March, 1808, and standing for judgment (8th March, 1809),

Lord Redesdale observed, that as the order appealed from had been pronounced by him, and he had differed in opinion from his predecessor, he thought it his duty to state to the House the grounds of his opinion; and he was the more inclined to do so from the high respect he entertained for the abilities of the noble and learned lord who had pronounced the former order, and from whom he had so much differed in opinion. But when he looked at the date of the order which he had reversed, he felt that the mind of Lord Clare must have been at that time so occupied with the extraordinary events which had recently passed, and were then passing in Ireland, that it was scarcely at leisure to attend to such a subject: and indeed it was a subject upon which probably the mind of Lord Clare had never been very attentively employed; and it was, on the contrary, a subject on which his own mind had been most attentively employed from his first entrance into the profession.

He observed that a plea was a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required. If a plea were allowed, nothing remained in issue between the parties, so far as the plea extended, but the truth of the matter pleaded. The court, in the first instance, declared that if the matter of the plea were true, the plaintiff was thereby debarred of the benefit of so much of his suit to which the plea extended. The allowance of the plea was therefore as complete a judgment against the claims of the plaintiff as could be given on the most solemn and deliberate hearing of the cause on the pleadings and proofs, provided the truth of the plea could be established by evidence.

Upon a plea allowed nothing is in issue between the parties but the matter pleaded, and the averments added to support the plea. Here the matter pleaded was the simple fact of the deed, and the averment that the deed was prepared with the consent of, and executed freely and voluntarily by Morgell. The plea extended both to discovery and relief as to all the transactions between the parties before and to *and upon* the 27th day of May, 1791, and it therefore exceeded the extent of the release, which went only to demands *to* that day; and consequently the plea was so far unquestionably bad, as it went beyond the matter pleaded, a circumstance which did not appear to have been attended to in the argument before Lord Clare. There could be no doubt, therefore, that the plea must be so far overruled. But as a plea might be good in part, and bad in part, the question remained whether the plea might be allowed, so far as it went to transactions prior to the 27th of May, 1791. He conceived it could not. The release was founded on a general settlement of accounts, which was the consideration for the instrument apparent on the face of it, and was a part of the very transaction, and an essential part, being the consideration on which the deed was founded. If the accounts were fairly adjusted, the release was fair, and was a bar to the relief sought by the bill to the time of the settled account; that is, the release would preclude the court from decreeing that the parties should come to a new account upon the same subject. But if the accounts were not fair, if they were liable to all the imputations cast on them by the bill, then the release was not a fair transaction, and ought not to preclude the court from decreeing a new account. The release, therefore, in no form of pleading could be a bar to the discovery sought by the bill, for upon that discovery would depend the validity of the instrument itself. If the release had been pleaded to the relief only, and the plea had been confined to the transactions prior to the 27th of May, 1791, it might perhaps have been a good plea to a certain extent with proper averments, and provided those averments were supported by a full answer to all the charges in the bill affecting the accounts. If the accounts had been annexed to the release, instead of being referred to by it, and on the face of the accounts so annexed the gross overcharges, false charges, and usurious charges imputed by the bill had appeared, it is manifest the release would have been no bar, because it would have been an instrument appearing on the face of it to have been founded in falsehood and fraud. There can be no substantial difference between an account annexed and an account referred to, except that, in the latter case, the identity of the account referred to must be established by evidence, which evidence a plaintiff in equity is entitled to demand on the oath of the defendant. Upon argument of a plea, every fact stated in the bill, and

not denied by answer in support of the plea, must be taken for true. The plea therefore to relief in this case ought to have averred that the accounts settled on the 27th of May, 1791, included all the dealings between the parties; that these accounts were just and fair, and that the balance of £4437 1*s.* 6*d.* was justly due to Roche; and these averments ought to have been supported by an answer to the same effect, setting forth the account settled, or referring to it, with an averment that the plaintiff had a counterpart, and specially negativing all the charges of fraud, imposition, usurious dealing, and error imputed to the transactions by the bill. With such averments, and such an answer, perhaps the plea of the release might have been good to a certain extent. Without those averments, and that answer, it could not be good to any extent, because without them the bill must be taken for true, the accounts must be taken to have been fraudulent, unfair, usurious, and erroneous, and consequently the release founded on those accounts must have been deemed an unfair transaction, and no bar to relief. It is manifest, therefore, the release could not be pleaded in bar of discovery of the transactions on which it was founded; and that being pleaded without the aid of proper averments, or any answer as to those transactions, it could not be a bar to relief, because, being so pleaded, the charges in the bill are all admitted to be true, and, if true, they are sufficient to avoid the instrument.

The case of Salkeld *v.* Science, 2 Ves. 107, 108, though very imperfectly reported, seems to be directly in point. That was a bill for an account, and a discovery of the dealings between the parties, to which a release was pleaded. It appeared that the release was founded on an account of those dealings made up; and as the plea went to discovery of those dealings, and of the account so made up, Lord Hardwicke held it to be bad, and therefore overruled it. Every release must be founded on some consideration, otherwise (as Lord Chief Baron Gilbert says, For. Rom. 57) fraud must be presumed. That consideration must be either a valuable consideration then given, or the adjustment of depending accounts. In the latter case, the fairness of the accounts is of the essence of the consideration. If they are not fair, the consideration is not fair, and the instrument founded on such a consideration is in itself void, and therefore operates nothing. Wherever a deed upon consideration is pleaded to a bill, in bar of a right which would exist if the deed did not exist, the consideration must be set out, its fairness must be averred by the plea, and if the bill charges matter tending to impeach the consideration, the defendant must, by answer, support the averments in the plea; a deed, therefore, cannot be pleaded to a discovery of the transactions on which the consideration of the deed, and consequently the deed itself, is founded.

Here the plea does not even put in issue the consideration on which the deed was founded. If the account settled on the 27th of May, 1791, were produced at the hearing of the cause, if on the face of that account it appeared that instead of above £4000 not £1000 was due, or even that the balance, fairly struck, was in favor of Morgell, and the bond for £4437 1*s.* 6*d.* appeared, therefore, a gross fraud, and as such impeachable in equity, yet the court having allowed the plea could give no relief, because it had debarred itself from examining the account; it must, therefore, suffer the manifest fraud to prevail. It could not even get rid of the embarrassment by directing the cause to stand over, the plea to be reargued, and on that reargument by overruling the plea: because, by allowing the plea, it had precluded itself from looking into, or even receiving any evidence on the subject.

It has been objected that the bill does not state the release, and pray that it may be set aside. It seems doubtful whether the release is put in issue by the bill. But whether it is or not, if the release appears to be founded on a vicious consideration, it is in itself void, and the court need not set it aside, but may act as if it did not exist. The bill prays the general account, and all the relief necessary for the purpose of obtaining that account. This prayer is sufficient. The bill does not pray specially that the bond of the 27th May, for £4437 1*s.* 6*d.*, should be set aside, though equally a solemn instrument under seal; and yet no one has suggested that the court could not, on a bill framed as this bill is, in directing a general account, give relief against the bonds, if it appeared that the consideration was bad, that is, that the sum secured by them was not justly due at the time the bonds were given. It was never thought of that a bill for an account of fraudulent dealings must specially pray that every bond, every instrument taken by the defendant without sufficient consideration, should be set aside. The prayer for general relief is sufficient for this purpose; and upon that prayer the court may give every relief consistent with the case made by the bill, and continually does give relief in no manner specifically prayed by the bill, and sought for only by the prayer for general relief. But the effect of allowing this plea would be to preclude the court from giving relief as to the bonds, though the release does not extend to them. The bonds must, as these pleadings stand, be presumed to have been taken without consideration, or at least without sufficient consideration, that is, it must be taken that £4437 1*s.* 6*d.* was not then due from Morgell to Roche; and yet, if the court is precluded from investigating the transactions on which the bonds were founded, namely, the transactions prior to the 27th May, 1791, the consideration of the bonds cannot be investigated, and the court must be bound to consider the sum secured by the bonds to have been justly due on the 27th of

May. It is clear, however, that the release does not extend to any claim founded on a transaction on the 27th of May. It therefore does not extend to cover the transaction of the bonds, which was on the 27th of May; and that transaction cannot be impeached without investigating the whole account, because the consideration of the bonds was the result of that account. This would of itself entitle the plaintiff to the discovery sought by the bill, and would distinguish this case from that of mutual releases, by which all transactions between the parties were completed, terminated, and concluded. The contrary fact in this case, the existence of demands founded on the former transactions, seems to make it difficult to support a plea of the release in any form as a bar, even to relief, as to all transactions prior to the 27th of May, 1791.

There remains to be considered another part of the case, which is in some degree independent of the settlement of accounts, namely, the fraud imputed to the purchase of Clonmeen, which seems principally to consist of undue advantage taken of the embarrassed situation of Morgell, and particularly compelling him to abandon a contract for sale of the estate at £10,000, and to take £8000 instead. This fraud could be no item in an account stated, though the £8000 might be; the release is founded on a stated account, and must therefore be confined, notwithstanding the generality of its terms, to the subject on which it rests, namely, the stated account. It cannot be taken to be a release of a right to impeach that sale, founded on an overreaching in the bargain. The account could apply only to the sum contracted for the purchase; the fraud in allowing the purchase could not be an *item* in it. All the accounts might be just and fair, and yet this contract might be unjust and impeachable, because unjust. A release, founded on a stated account, could not extend at law to the title to an estate, or prevent the party releasing, avoiding on the ground of fraud a deed affecting that title. On this ground, also, the plea is objectionable to relief as well as to discovery, and is no answer to so much of the bill.

15th March. — The case standing for judgment,

Lord Chancellor (Lord Eldon) entered very fully into discussion of the pleadings and the grounds on which he considered the plea ought to be overruled. And upon his Lordship putting the question,

The order of the 5th December, 1803, was affirmed.

JOHN CROW AND SARAH HIS WIFE (*formerly* SARAH MYHILL), JONATHAN TOWNSEND AND MARY HIS WIFE (*formerly* MARY MYHILL), AND JOHN SURRIDGE *v.* SIR JOHN TYRELL, BART.

BEFORE SIR THOMAS PLUMER, V. C. DECEMBER 12 AND 21, 1817.

[*Reported in* 2 *Maddock*, 397.]

THE bill, filed 26th November, 1816, stated that Edward Sulyard, deceased, being in his lifetime and at the time of his decease seised in fee-simple, or otherwise well entitled to certain hereditaments and premises, by his will of 21st of February, 1690 (amongst other things), gave, devised, and bequeathed unto Dorothy Sulyard, daughter of his brother Augustine Sulyard, all those his three messuages or tenements and farms, &c., situate in the parishes of Runwell and Downham in Essex, or elsewhere in the said county (and which said premises were therein more particularly described), to hold to Dorothy Sulyard and her heirs for ever, to her and their own use and uses for ever: that the testator died in 1692 without altering or revoking such will, and upon or soon after his decease the said Dorothy Sulyard, then Dorothy Parker (she having previously intermarried with Charles Parker, late of Runwell, in the county aforesaid, deceased) together with her said husband, entered into possession of the said real estates so devised to her as aforesaid: that the said Dorothy Parker died in 1711 or 1712 intestate, leaving a son, Charles Parker, her only child, her surviving, in whom the said real estates were upon her decease vested, and [who] took possession thereof as her heir-at-law: that the said last-mentioned Charles Parker died in 1753 intestate and without issue, and without having in his lifetime disposed of the said real estates so devised as aforesaid, whereupon the same descended to and became vested in Frances Marler and Maria Valentine Marler, since deceased, as sisters and coheirs-at-law of the said Dorothy Parker and the said last-mentioned Charles Parker, *ex parte materna*, the said Frances Marler and Maria Valentine Marler being the daughters and only children of John Marler, late of Downham aforesaid, Esquire, deceased, who was

eldest son and heir-at-law of John Marler, late of Downham, Esquire, deceased, and which said last-mentioned John Marler was the eldest son and heir-at-law of John Marler, Esquire, deceased, and Anne his wife, which said Anne Marler was formerly Anne Sulyard, sister of the said testator Edward Sulyard, and aunt of said Dorothy Parker, and whose descendants were the only persons who partook of the blood of the said testator Edward Sulyard and said Dorothy Parker when the said last-named Charles Parker died: that upon or soon after the decease of the said last-named Charles Parker, John Tyrell, late of Hatfield Peverell, in the county aforesaid, deceased, entered into the possession of the real estates of which the said last-named Charles Parker died seised, and which descended to him from his said mother Dorothy Parker as aforesaid, and continued to hold the same by the permission of and as tenant to the said Frances Marler and the said Maria Valentine Marler, until the decease of the said Maria Valentine Marler; but upon or soon after her decease assumed and took upon him the absolute ownership of the said real estates, which so descended and were vested in the said Frances Marler and the said Maria Valentine Marler, in her lifetime, as her coheir as aforesaid: that the said Frances Marler in her lifetime intermarried with Thomas Myhill, of Finchingfield, in the county aforesaid, Esquire, deceased, and that she departed this life in or about the year ——, leaving Marler Myhill, late of Finchingfield aforesaid, deceased, the late father of plaintiffs Sarah Crow and Mary Townsend, her eldest son and heir-at-law her surviving, in whom one undivided moiety of the said real estates which descended to said Frances Myhill, as such coheir as aforesaid, became vested: that the said Marler Myhill, the late father of said last-named plaintiffs Sarah Crow and Mary Townsend, died the year 17— intestate, and without having disposed of his interest of the said undivided moiety of the said real estates which so descended to him as aforesaid, leaving said last-named plaintiffs, his only children and coheirs-at-law, him surviving, and as such entitled to the said undivided moiety of the said real estates, which descended to and was so vested in the said Marler Myhill as aforesaid: that plaintiff Sarah Crow, formerly Sarah Myhill, some time since intermarried with plaintiff John Crow, and plaintiff Mary Townsend has also intermarried with Jonathan Townsend, and said plaintiffs, John Crow and Jonathan Townsend, are respectively now entitled, in right of their said wives respectively, to such right and interest as is claimed by them in said real estates: that the said Maria Valentine Marler in her lifetime duly intermarried with John Surridge, of Runwell, in the county of Essex, farmer, deceased, and that the said Maria Valentine Surridge departed this life in or about the year 1786 intestate, leaving John Surridge, late of Runwell

aforesaid, farmer, deceased, the plaintiff John Surridge's late father, her only son and heir-at-law her surviving, and in whom one undivided moiety of the said real estates, which descended to the said Maria Valentine Surridge as such coheir as aforesaid, became vested: that the said John Surridge, said plaintiff's late father, departed this life in or about the year 1787 intestate, and without having done any act to dispose of his interest in the said undivided moiety of the said real estates which descended to him as aforesaid, leaving said plaintiff John Surridge his only son and heir-at-law him surviving, in whom the said undivided moiety of the said real estates is now vested; and said plaintiffs John Surridge and Sarah Crow and Mary Townsend, or plaintiffs John Crow and Jonathan Townsend their said husbands, in their right, are now the only persons entitled to the said real estates: that the said John Tyrell, when he so entered into possession of the said real estates as aforesaid, possessed himself of all the title-deeds and writings relative thereto, and, after the decease of the said Maria Valentine Surridge, formerly Maria Valentine Marler, refused to give up possession thereof, or of the said estates, or to acknowledge the right or title of any other person or persons thereto, pretending that he was absolutely entitled to the said real estates, by reason of some gift or devise to him thereof made by the said last-named Charles Parker, deceased, or some other person or persons absolutely entitled to the said real estates, although he refused to discover the same; and the said John Tyrell, in order to establish his pretended right to the said real estates, imposed upon the persons entitled thereto, by giving out and pretending that William Marler, the brother of the said John Marler, the father of the said Frances Marler and Maria Valentine Marler, married the said Dorothy Parker, formerly Dorothy Sulyard, and that she never married or had issue by the said Charles Parker, but that she had issue an only daughter, Mary Marler, by her alleged husband, the said William Marler, which said Mary Marler intermarried with him the said John Tyrell, and that the said real estates vested in him in right of his said wife, which pretences the said John Tyrell knew at the time were, as the fact is, altogether false and unfounded; but the said John Tyrell and his descendants persisting therein, have retained possession of the said real estates, and the defendant, Sir John Tyrell, Bart., now holds and enjoys the same in exclusion of the plaintiffs, who are justly entitled thereto as aforesaid; and in order to give color to such pretences and such alleged title to the said real estates, a tomb or gravestone has been put down over the remains of the said first-named Charles Parker by the order or direction of the said first-mentioned John Tyrell, or by some or one of them claiming under him, stating the name of the wife of the said Charles Parker to have been Ann

instead of Dorothy, which was her real name; and a tablet or monument has also, by the order and direction of the said first-mentioned John Tyrell, or by some or one of them claiming under him, also been placed near the body of the said Edward Sulyard, stating the said Edward Sulyard to have been the last of his house and family, whereas the family of the said testator Edward Sulyard are now extant in the persons of plaintiffs Sarah Crow and Mary Townsend and John Surridge, who are his right heirs at law, and as such entitled to the said real estates; and the said John Tyrell, or some of his descendants, have also caused or procured the registers of the said parishes of Run well and Downham aforesaid, which contained an account of the family and descent of said last-named plaintiffs, to be taken away and concealed, or otherwise disposed of, in order to prevent plaintiffs from establishing their right to the said real estates: that the said John Tyrell died in 1786, leaving John Tyrell his only son and heir-at-law him surviving, who, as such heir-at-law, and under color of such pretences as aforesaid, entered into and possessed himself of all the said real estates to which plaintiffs are so entitled as aforesaid; and he the said last-mentioned John Tyrell in his lifetime, as it is alleged, made his will, and thereby gave all the real estates to which plaintiffs are so entitled as aforesaid unto his two sons Charles Tyrell and John Tyrell, now Sir John Tyrell, Bart., and their heirs for ever: that the said Charles Tyrell died, as it is alleged, in the lifetime of the said Sir John Tyrell, a bachelor, and intestate, and the entirety of the said real estates, to which plaintiffs are so entitled as aforesaid, was thereupon and now are possessed by the said Sir John Tyrell, and enjoyed by him in exclusion of plaintiffs, and he claims the same under color of such pretences as aforesaid, either as heir-at-law of his late father and brother respectively, or as such devisee thereof as aforesaid, and as heir-at-law of his said late brother: that plaintiffs lately, and within six years last past, discovered that such frauds as aforesaid respecting the title to the said real estates and the possession thereof, have been practised to defeat the rightful claim of plaintiffs and the several persons respectively who were previously entitled thereto; and that although ever since the death of the said Charles Parker, and the decease of the said Maria Valentine Surridge, formerly Maria Valentine Marler, whom the said first-mentioned John Tyrell repeatedly acknowledged and treated as the owner of the said real estates or as entitled thereto as one of such coheirs as aforesaid, the said real estates were constantly claimed by plaintiffs Sarah Crow and Mary Townsend, and, since their marriage, by their husbands in their respective rights, and by plaintiff John Surridge, and their ancestors, and a discovery of the title of the said first-mentioned John Tyrell and his

descendants sought by them; yet since such discovery as hereinbefore mentioned has been made, plaintiffs have frequently of late by themselves and otherwise applied, &c. The bill then charged that the last-mentioned John Tyrell frequently recognized and acknowledged the right and title of the said Frances Myhill, formerly Frances Marler, and the said Maria Valentine Surridge, formerly Maria Valentine Marler, to the said real estates as such coheirs as aforesaid, and that he had no right to occupy, possess, or enjoy the same, except by permission of them or one of them, who he confessed were or was the person or persons lawfully entitled thereto. The prayer of the bill was that the said Sir John Tyrell might leave such of the said title-deeds, evidences, and writings belonging or in any way relating to the said real estates as are now in his custody, possession, or power, in the hands of his clerk in court for the inspection of plaintiffs, their solicitors and agents, with liberty for them to take copies thereof, or extracts; and that the said Sir John Tyrell might also set forth an account of all the said real estates to which plaintiffs are so entitled as aforesaid, and which were and are now so fraudulently retained by the said last-mentioned John Tyrell and the said Sir John Tyrell the present possessor thereof, together with the names of the places and parishes in which the same are respectively situate, and the yearly rents at which the same are let, and the particular quantities and number of acres of land of which the said real estates consist, and the particular kinds and species of such land, and the quantities of each kind; and that the said Sir John Tyrell might make a full and true disclosure and discovery of and concerning the several matters aforesaid, so as to enable plaintiffs to take such proceedings as they may be advised are necessary for recovering possession of the said real estates.

To this bill the defendant put in the following plea:—

This defendant, by protestation, &c., doth plead to the said bill, and for plea saith that (to the best of his, this defendant's, knowledge, information, and belief) Charles Parker, secondly in the said bill named, was not, nor were nor was Frances Marler and Maria Valentine Marler in the said bill named, or either of them, nor were nor was any others or other of the ancestors of the said complainants Sarah Crow, Mary Townsend, and John Surridge, by, from, through, or under whom the said complainants, in right of the said complainants Sarah Crow, Mary Townsend, and John Surridge, by their said bill, claim or make title to the hereditaments and premises therein mentioned, seised of such hereditaments and premises or any part or parts thereof, within threescore years next before the filing of the said bill of complaint, nor had they, or any or either of them, within that period, possession of the said hereditaments and premises, or any part or parts thereof, either by

themselves, himself, or herself, or by John Tyrell, first in the said bill named, or by any other person or persons as their, his, or her tenant or tenants, or otherwise howsoever; wherefore, &c.

Mr. *Garratt*, in support of the plea. This plea is founded on the 32 Hen. 8, c. 2. It follows the words of that statute. The act extends to proceedings at law and in equity. The filing a bill is the making of a claim. The proper mode of defence was by plea. Lord Redesdale says,[1] "If the plaintiff's case is not such as entitles a court of equity to assume a jurisdiction to compel a discovery in his favor, though he falsely states a different case by his bill, so that it is not liable to a demurrer, the defendant may by plea state the matter necessary to show the truth to the court." Such is the present case; the plaintiff has shown a *prima facie* right to relief; this plea, therefore, is proper.

A plea to a bill of discovery showing the legal title is not in the plaintiffs was held to be good in Cholmondeley *v.* Clinton.[2]

Mr. *Hart* and Mr. *Willes*, in support of the bill. The plea is bad in form and in substance. There is no mode of obtaining a discovery and production of the deeds unless by bill. The bill must be considered as a bill for relief. The prayer is, "that the defendant may answer all and singular the premises, and further to stand by and abide such order and decree," &c. The plea is not *ad idem;* it does not answer the specific facts stated in the bill. Lord Redesdale says,[3] "In pleading there must in general be the same strictness in equity as at law, at least in matter of substance. A plea in bar must follow the bill, and not evade it, or mistake the subject of it." This plea affects to meet the bill; but it does not. The bill states the death of Charles Parker in 1753, and the entry of Tyrell, soon after Charles Parker's death, as tenant to Frances Marler and Maria Valentine Marler, the ancestors of the present claimants, and that he continued as such tenant until the death of Maria Valentine Marler. We have therefore a right to a specific answer as to this fact, for if it be true that he did enter on the estate at that time as tenant, and so continued until the death of Maria Valentine Marler, his possession was the possession of his landlords, and the sixty years' adverse possession has not elapsed. In the case of long building leases a trifling rent is frequently reserved, and the lessor may not receive it for a long period of time, but if the lessee claims the estate he is entitled to a discovery. But the plaintiffs have in this case stated acts of fraud, taking down a tombstone and putting up another, and taking possession of the deeds, which, if true, would entitle them to relief, though centuries had since elapsed; and as these acts are not

[1] Tr. Plead. 228, 3d ed. [2] 2 Mer. 71. [3] Tr. Plead. 237, 3d ed.

denied by the plea they must be considered as admitted. In Bond v. Hopkins,[1] Lord Redesdale says this statute is not operative in cases of fraud. If the bill is to be considered as for discovery only, they cannot resist that discovery by pleading the statute. Dean and Chapter of Westminster v. Cross;[2] Baillie v. Sibbald.[3]

Mr. *Garratt*, in reply. This is a mere bill of discovery. The words quoted from the prayer are mere words of course, and always used in bills of discovery. If Tyrell held the estate as tenant within sixty years the defendant must be perjured, as the plea positively states that neither Charles Parker, or Frances Marler and Maria Valentine Marler, or any of the ancestors of the plaintiff, were seised of the estate within sixty years, which was not true if Tyrell was tenant to the ancestors of the plaintiffs within that period. If Tyrell was so in possession as tenant the plea might have been replied to. The fact is that Tyrell died before Frances Marler and Maria Valentine Marler, so that if the plea be defective the court will allow us to amend it. With respect to the fraud relied upon, as this is not a bill for relief but for discovery only, the defendant was not bound to answer as to the imputed fraud. The statute is general, and does not except cases of fraud. It has been argued the statute cannot be pleaded to a bill of discovery. There is a case in Bunbury to that effect, but I searched for the plea and could not find it. Nothing on that subject was determined in Baillie v. Sibbald. In that case, as there was an acknowledgment of the debt stated in the bill, it was held a plea of the Statute of Limitations was not sufficient, but that the stated acknowledgment must be answered.

The Vice-Chancellor. This must be considered as a mere bill of discovery, no relief being prayed. The prayer that the defendant may set forth a list of title-deeds, &c., and that they may be placed in the hands of the clerk in court for inspection, is incidental to the discovery, and does not make it a bill for relief.

The court never gives a discovery unless the plaintiff shows himself entitled to it, and that he will be benefited by it.

The plea states that certain persons named in the bill, nor their ancestors, have had seisin or possession of the premises within sixty years before the filing of the bill, but it does not state that the plaintiffs have not had seisin or possession within sixty years; that omission, however, is not fatal to the plea, as the plaintiffs by their bill admit they have not had seisin or possession within sixty years.

If a person enters as tenant by permission of the rightful owner, and

[1] 1 Sch. & Lefr. 430.

[2] Bunb. 60. [In the Exchequer, May 14, 1720. "The Statute of Limitations was pleaded to a bill of discovery, but it was overruled." — Ed.]

[3] 15 Ves. 185.

continues so for a great length of time, though without paying rent, the owner would still be considered as in possession by means of his tenant. The bill states that Tyrell entered as tenant to Frances and Maria Valentine Marler, and so continued as tenant till 1786, when Maria Valentine Marler, then Maria Valentine Surridge, died, which constitutes a seisin and possession within thirty years, and that Tyrell recognized the Marlers to be coheirs. If that be so, and the pedigree stated in the bill be correct, the plaintiffs show a title to relief. The plea does not state a seisin and possession for sixty years in the defendant, but only negatives the seisin and possession of those through whom the plaintiffs claim, and negatives generally the fact stated in the bill, that Tyrell entered as tenant, and kept possession as such, till the death of Maria Valentine Marler; but that is not the mode in which the facts stated in the bill ought to be met. It is not sufficient generally to deny the inference drawn from facts. The bill says Tyrell entered as tenant to Frances Marler and Maria Valentine Marler; the plea says nothing as to that. The bill states Tyrell acknowledged the tenancy; but as to that the plea is silent. The plea is good in substance but not in form, as it avoids answering, otherwise than generally, the specific facts I have mentioned, which are stated in the bill.

Plea overruled.

ARNOLD v. HEAFORD, NICHOLSON, AND OTHERS.

IN THE EXCHEQUER. EASTER TERM, 1825.

[*Reported in M'Cleland & Younge*, 330.]

THIS was a bill for the redemption of a mortgage. William Arnold the elder, on the 12th August, 1774, mortgaged to James Joy, for £250, certain premises in Kent for the residue of a term of 100 years, of which Joy took possession in 1786. William Arnold died in November, 1804, having by his will given the residue of his estate after payment of his debts to the plaintiff, his son, and appointed W. Heaford his sole executor. W. H. proved the will, and paid all the debts except the mortgage. W. H. died in 1820, having by his will appointed T. Heaford his sole executor; and the latter was now the personal representative of both the said testators. J. Joy died some years since, and Abraham Morris was his personal representative. The bill stated these facts, and that, shortly after the decease of Joy, Morris entered into the possession of the mortgaged premises, or the receipt of the rents and profits; but that the premises, or certain parts thereof, were now in the respective possessions of Nicholson, Batten, and several other persons, co-defendants with Heaford and Morris, who claimed to be entitled thereto by virtue of some conveyances or conveyance from Joy or Morris, and that they had respectively received the rents and profits of the premises, or such parts whereof they were in possession, to a very considerable amount. The bill alleged that the indenture of mortgage was in the possession or power of some of the defendants; that the conveyance to Nicholson, Batten, &c., was made as of mortgaged premises, subject to redemption, and that accounts had been kept by them as mortgagees within twenty years; and that the mortgage had been long before fully satisfied by perception of the rents and profits. The bill charged that the premises, or some of them, had been treated or considered by Joy and Morris and the other defendants, or some of them, within twenty years, as subject to the mortgage and liable to redemption; that Heaford and the other defendants acted in collusion together for the purpose of preventing re-

demption; and that there were now, or lately, in the custody or power of the defendants, their attorneys or agents, deeds, books, and accounts, relating to the matters aforesaid from which it would appear that the premises, or parts of them, had been treated by Joy and some of the defendants within twenty years as subject to the mortgage.

As to so much of the bill as prayed any relief, account, or discovery against him, other than such parts of the bill as sought a discovery respecting deeds, &c., or as charged him with collusion, defendant, Nicholson, put in a plea and answer: the plea averred that, to the best of defendant's belief, the indenture of mortgage in the bill alleged to bear date on or about the 12th August, 1774, and to be made between W. Arnold the elder, deceased, and J. Joy, deceased, or any such indenture of mortgage, made by said W. A. to J. J. (if any such was made, which defendant by no means admitted), did not include, or purport to include or comprise, assign, pass, charge, or in any manner affect any messuages or tenements, &c., whatsoever, now in the possession of defendant, or of, in, or to which defendant claims any right, title, or interest whatsoever; that there are not, and is not now, were not, and was not lately, or at any time since, in the custody or power of defendant, or his attorneys or agents, attorney or agent, the alleged indenture of mortgage of 12th August, 1774, or any deeds, books, or accounts, &c., which related to, or contained extracts relating to, any of the matters in the bill mentioned. That the other defendants (naming them), or any of them, do not, or does not, act in collusion together with this defendant, for the purpose in the bill alleged, or any such purpose. The answer, in support of the plea, denied, in the terms of the plea, *mutatis mutandis*, the possession of the indenture of mortgage, or any deeds, &c., relating to the subject of the suit, or from which it would appear that the premises, or any part thereof, had been treated by the defendant within twenty years as subject to said alleged, or any such or the like mortgage, or as liable to redemption; it also denied the charge of collusion in like manner.

Longley, for the plea, said it was good as a negative plea, and cited Drew *v.* Drew,[1] as an authority for the sufficiency of its first allegation, "to the best of defendant's belief."

Simpkinson, for the plaintiff, allowed that a negative plea might be good if it reduced the defence to a single point, but insisted that this plea did not do so, and was nothing but an insufficient answer. It was multifarious, and tendered three distinct issues: 1st, that the mortgage deed did not charge any land in the occupation of the defendant, or to which he claimed title; 2d, the non-possession of deeds relating to the subject of the suit; 3d, that the defendants did not collude to

[1] 2 Ves. & Bea. 159.

prevent a redemption. The first issue was not pleaded with sufficient certainty. In some particular excepted cases a pleading as to belief was sufficient, but this was not one of them. The plea did not meet the allegations of the bill, that the premises had been conveyed to the defendants as mortgaged premises, and that they had kept accounts as mortgagees, and otherwise treated the premises as liable to redemption within twenty years. It was therefore bad, for the defendant was bound to discover as to the collateral circumstances, either by plea or answer. Kinnersley *v.* Simpson;[1] Gun *v.* Prior;[2] Jones *v.* Davis;[3] Evans *v.* Harris.[4] Moreover, the plea was overruled by the answer, because the answer repeated the two last branches of the plea.

Longley, in reply. The necessity of resting the plea upon belief arises from the manner in which the bill is drawn. It is a fishing bill. The denial of the fact that the defendant is in possession of any part of the mortgaged premises sufficiently meets the whole of the allegations in the bill. The answer does not overrule the plea, because the matters which it repeats are equitable circumstances in favor of the plaintiff's case against the other matter pleaded, and it was necessary to deny such charges in both ways. Ld. Redes. Tr. 2d ed. 236, 237.

THE COURT said that the plaintiff's case was not barred by the allegation that, to the best of defendant's belief, the indenture of mortgage comprised no premises in his possession, or to which he claimed title; that the plaintiff was entitled to the best possible evidence of his title; that the allegations that the premises had been conveyed to the defendants with a knowledge of the mortgage, and that accounts had been kept by them as mortgagees within twenty years, were extremely material, and should have been met by a direct and positive negation: that the plea, therefore, did not go far enough, was much too loose and general, and ought to be overruled. *Plea overruled.*

[1] For. 85. [2] Ibid. note, p. 88; s. c. 1 Cox, 197.
[3] 16 Ves. 282. [4] 2 Ves. & Bea. 361.

HARDMAN v. ELLAMES.

BEFORE SIR LANCELOT SHADWELL, V. C. NOVEMBER 11, 1833.

[*Reported in* 5 *Simons*, 640.]

BEFORE LORD BROUGHAM, C. FEBRUARY 1 AND 8, 1834.

[*Reported in* 2 *Mylne & Keen*, 732.]

THE bill stated that John Hardman, being seised or well entitled in fee-simple in possession of or to one undivided moiety of certain estates in the county of Lancaster, by his will duly executed and attested, and bearing date the first day of November, 1754, devised his undivided moiety of the estates unto his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail, and in default of such issue to his executors for the term of ninety-nine years, to commence upon his decease, and, subject thereto, to his nephew, John Hardman, for life, with remainder to trustees to preserve contingent remainders, with remainder to his nephew's first and other sons successively in tail, with remainder to his nephew, James Hardman, for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of James Hardman successively in tail, with remainder to the testator's own right heirs: and the testator declared the trusts of the term of ninety-nine years to be for enabling his nephews and the other persons to whom his estates were successively devised, as they should become possessed thereof, to make jointures for their wives and provision for their younger children; and that, in the mean time, the term should be in trust for the person or persons to whom the next and immediate reversion, remainder, or estate in the premises should from time to time belong: and he appointed his wife Jane Hardman, and Jane Hardman the widow of his late brother James Hardman, and James Percival, executors of his will.

The bill further stated that the testator died about December, 1755, without issue, and that Jane Hardman the widow and Jane Hardman the sister alone proved his will, and entered into possession or receipt of the rents of his moiety of the estates, as the trustees of the term, and continued in such possession or receipt during their lives,

claiming to hold the same for the term: that they, or one of them, were or was, or claimed to be, entitled to the other moiety of the estates by a distinct title, and were for many years in possession or receipt of the rents of such other moiety, and from time to time granted leases of divers parts of the estates, and particularly, by an indenture of the 8th of January, 1756, they demised certain parts of the estates to one Harrison for twenty-one years, at the rent of £240, and in 1777, 1788, and 1794 they granted other leases for twenty-one years of the same premises to certain persons mentioned in the bill; and in or about 1794, Jane Hardman the widow, having survived Jane Hardman the sister, granted a lease of the same premises to one Grace for twenty-one years, at the rent of £400, and Grace, or his undertenants, continued in possession of the premises under that lease until 1815: that Jane Hardman the sister died in or about 1793, and Jane Hardman the widow in 1795, having appointed certain persons, of whom T. Earle was the survivor, her executors, and they all proved her will, and, as her representatives, became possessed of the testator's moiety of the estates for the residue of the term of ninety-nine years, and entered into possession or receipt of the rents thereof, and *continued to receive such rents, or some part thereof, until some time after* 1815: that T. Earle died in or about 1822, having appointed the defendants, William Earle, Hardman Earle, and Richard Earle, his executors, and they proved his will, and thereby became his representatives, and also the representatives of Jane Hardman the widow and of John Hardman the testator, and that the term of ninety-nine years became and still was vested in them: that some years ago the defendant Ellames became, or alleged himself to be, in some manner, entitled to the moiety of the estates which did not belong to the testator; and, some time after 1815, Ellames entered into the receipt of the rents of the whole of the estates, and was allowed by the representatives of Jane Hardman the widow to receive the whole thereof; and *for some time after* 1815 *he accounted to them for a moiety of the rents*, but for some years past he had retained the whole to his own use: that Jane Hardman the widow and Jane Hardman the sister, during their lives, applied the rents of a moiety of the estates, or some parts thereof, according to the trusts of the term of ninety-nine years; but after the death of Jane Hardman the widow, her executors retained in their own hands the whole of the rents received by them, as well as such part of the rents received by Jane Hardman the widow and Jane Hardman the sister as were not applied according to the trusts, alleging that they were unable to discover the persons entitled thereto under the trusts of the will; and that the rents so unapplied were still in the hands of the defendants, the Earles, *who admitted*

that they held the same as trustees for the persons entitled under the trusts of the will, but alleged that they could not take upon themselves to determine who was entitled thereto, without the sanction and indemnity of the court: that the testator did not leave any issue, or any brother or sister, or any issue of any brother or sister, except his nephews, John and James, who died intestate and without issue: that Richard Hardman, deceased, was father of the testator, and that John Hardman was the brother of Richard, and the uncle of the testator, and that John Hardman the uncle died intestate in 1695, leaving John Hardman his eldest son and heir, who died intestate in or about September, 1755, leaving John Hardman his eldest son and heir, who died intestate in September, 1786, leaving John Hardman his eldest son and heir; and the last-named John Hardman died intestate in December, 1822, leaving the plaintiff his only son and heir, and, by the means aforesaid, the plaintiff had become the heir of the testator, and that letters of administration to his father and grandfather had been granted to him: that, as such heir, and as such personal representative, the plaintiff was entitled to the undivided moiety of the estates which belonged to the testator, and of the rents arising therefrom which were unapplied and were in the hands of the defendants, the Earles, and also to a moiety of the rents which had been received by the defendant Ellames, and had not been accounted for by him to the representatives of Jane Hardman the widow.

The bill then alleged that Ellames pretended that he purchased the estates for valuable consideration, without notice of the plaintiff's title; but the plaintiff charged that, if Ellames purchased the estates, he had notice of the testator's will, and of the right of the testator's right heir under the limitations therein contained, and that the will was noticed in the abstract of the title of the premises which was delivered to him on the occasion of his alleged purchase, or in some of the deeds mentioned in the abstract, and was recited or referred to in the deeds whereby the premises were conveyed to him, and that, thereby or otherwise, he had notice of the plaintiff's claim: that Ellames sometimes pretended that the term of ninety-nine years had been assigned to or in trust for him; but the plaintiff charged that if the term had been so assigned, Ellames had at the time notice of the trusts declared of the term by the will. The bill further charged that there were several outstanding terms in the estates, created prior to the term of ninety-nine years, which were then vested in persons unknown to the plaintiff; and in case the plaintiff should proceed by ejectment to recover possession of the said moiety of the estates, the defendants threatened to set up the term of ninety-nine years and such other outstanding terms to defeat such action; and that the defendants had in

their possession deeds and other documents relating to the estates and the title thereto and the other matters aforesaid, and showing the truth of such matters, and particularly of the matters before stated as to the plaintiff's pedigree, and that Jane Hardman the widow and Jane Hardman the sister retained possession of the estates under the term of ninety-nine years, and upon the trusts thereof; and that many of such documents would show the particulars of the outstanding terms, and that the plaintiff was the heir-at-law of the testator.

The bill prayed that it might be declared that the plaintiff, as the heir-at-law of the testator, was entitled to one undivided moiety of the estates, and that Ellames might be decreed to deliver up the possession thereof to the plaintiff, and to account with him for the rents of the moiety of the estates which had been received by him, and that the defendants, the Earles, might be decreed to account with the plaintiff for the rents of the moiety of the estates in their hands, and to assign to him the term of ninety-nine years; or that the plaintiff might be at liberty to proceed by ejectment for the recovery of the moiety, and that the defendants might be restrained from setting up the term of ninety-nine years and the other outstanding terms, and for a receiver of the rents.

The defendant Ellames, by leave of the court, put in the two following pleas to the bill:—

1st. That John Hardman the nephew survived James Hardman the nephew, and died in March, 1759. And this defendant avers that the title, if any, of the plaintiff, or of the party through whom by his bill he claims the moiety of the estates and premises in respect of which he seeks relief by his bill, accrued on the death of John Hardman the nephew, and that the possession of the moiety, and the receipt of the rents thereof, have been adverse to the plaintiff and the persons through whom by his bill he claims ever since the death of John Hardman the nephew.

2d. That the legal personal representatives of Jane Hardman the widow did not, nor did any of them, ever enter into possession or receipt of the rents of the moiety of the estates comprised in the term of ninety-nine years, or any part thereof.

Sir *E. Sugden* and Mr. *Booth*, for the defendant Ellames. The first plea states that the title of the plaintiff accrued on the death of John Hardman the nephew in 1759, and that there has been adverse possession ever since. Leave to plead double was given in order to prevent an implication of continuing trusts which might have precluded adverse possession. We deny the allegation in the bill that the persons whose alleged entry would have saved the time ever were in possession.

The House of Lords decided, in Cholmondeley *v.* Clinton,[1] that if

[1] 4 Bligh, 1.

persons are receiving for twenty years that to which they are not entitled, that receipt will be a bar. Then came the second case of Cholmondeley v. Clinton,[1] which was a bill of discovery to assist an ejectment for other part of the property. And Lord Eldon there decided that though a party might have a right at law to recover, he should have no assistance of any kind in equity, after having allowed another person to enjoy his rights for twenty years. In this case we have had adverse possession of the fee-simple since 1759, and there has been no entry on the term since 1795, when Jane Hardman the widow died. It is not suggested that the plaintiff could not have sooner sued. The leases mentioned in the bill apply to part only of the estates.

Nothing more is requisite in a plea of adverse possession than this plea contains. It raises a material issue, namely, the fact of adverse possession.

Mr. *Knight* and Mr. *Jacob*, for the plaintiff. Adverse possession is a conclusion of law deduced from facts, especially where there has been a trust. The plea leaves the court uncertain whether it means that all the persons whom the bill alleges to have been in possession were in possession, but in such a way that the defendant considers it to have been adverse to the plaintiff, and not as trustees; or whether it means that they were not in possession, but that he, the defendant, was in possession. Now he is bound to state which he means. Jerrard v. Saunders.[2] The term of ninety-nine years is still subsisting, and the question is whether the plaintiff is not entitled to relief in equity before the end of that term. The statements in the bill that the defendants, the Earles, admit that they hold the rents in their hands as trustees for the persons entitled thereto under the will, must be taken to be true. The defendant does not aver that he is entitled to both moieties of the estate; and the bill alleges that for some time after 1815 the defendant accounted with the representatives of Jane Hardman the widow for a moiety of the rents. That allegation also must be taken to be true; it cannot, therefore, be said that the defendant has acquired a title by adverse possession to the whole. It is clear that he is accountable to our trustees.

The bill charges that the defendant has in his custody deeds and other documents showing the truth of the matters stated in the bill. That charge ought to have been denied by answer.

Sir *E. Sugden*, in reply. If a plaintiff states a title in himself, and then goes on to charge certain facts as evidence of his title, the defendant must by answer negative those facts. But here the plea of adverse possession since 1759 goes to the result of all the facts stated in the bill. If, therefore, the defendant had answered either the allegation that the Earles had admitted that they had rents in their hands, and

[1] 1 Turn. & Russ. 107. [2] 2 Ves. jun. 187.

that they held the same for the persons entitled under the will, or the allegation that Ellames had accounted for a moiety of the rents since 1815, he would have overruled his plea. Thring *v.* Edgar;[1] Jermy *v.* Best.[2]

The VICE-CHANCELLOR. I quite agree with the defendant's counsel that it is not necessary, in order to make a plea of adverse possession perfect, that the pleader should enter into a negative of the particular circumstances which the plaintiff states in his bill for the purpose of showing that with respect to him there was not an adverse possession. That is quite consistent with the rule laid down in Thring *v.* Edgar. But the method here adopted of pleading adverse possession is not proper, because this plea is not, strictly speaking, a negative plea; but when it states that there was adverse possession, it means to have it understood that there was or were some person or persons in possession who may have been the persons in possession named in the bill, or not any of those persons, and that the persons in possession have held under such circumstances that their single possession, or the collective possession of all, was altogether an adverse possession. It is, I think, incumbent on a defendant who means to plead an adverse possession, so to state the circumstances that the plaintiff may know what facts he is to prove, when he is afterwards required to meet the truth of the plea. Now this plea does not at all show what is the specific nature of the case that the defendant means to set up, and it is quite impossible for any person to divine, from the statements of this plea, which particular state of circumstances may be selected by the defendant as constituting his defence. I am of opinion, therefore, that this plea is defective, not because it does not negative the circumstances that constitute the plaintiff's case, for if it did, that would overrule the plea, but because it has so stated the nature of the defence that no human being can comprehend what that defence is.

I am also of opinion that this plea is defective because it is not supported by an answer with respect to the collateral circumstance charged by the bill, that the defendant is in possession of deeds and documents. For I apprehend that, according to the rule laid down in Thring *v.* Edgar, if a person pleads a plea of a negative kind, or indeed any plea inconsistent with the plaintiff's case, he is bound to support it by answer, so far as the bill has charged any collateral matter. Thus, for example, when a defendant pleads that he is a purchaser for valuable consideration without notice to a bill which has charged that he has in his possession certain papers and documents, whence it will appear that his is not a purchase without notice, then by the rules of this court the defendant is bound to support his plea by an answer as to that charge. Now, inasmuch as there is in this bill a charge that the defendants have

[1] 2 Sim. & Stu. 274. [2] 1 Sim. 378.

in their possession certain deeds, documents, and writings, showing the truth of the matters stated in the bill, my opinion is that, where a defendant pleads such a plea as that now before the court, and gives no answer to that charge, his plea is insufficient and must be overruled.

Upon the other plea I do not suppose that the defendant means seriously to insist. The court has already, in the case of another defendant, decided against it, and that plea also must be overruled.

The defendant Ellames appealed from the foregoing decision.

Sir *E. Sugden* and Mr. *Booth*, in support of the pleas. The first plea is that the title stated by the plaintiff accrued in 1759, and that there has been possession adverse to the plaintiff ever since. One objection taken by the other side was, that adverse possession was not a sufficiently definite and technical expression; but that expression is recognized as a term of art by Lord Mansfield, and by Mr. Justice Aston in Doe *v.* Prosser.[1] "What is adverse possession or ouster," says Mr. J. Aston in that case, "if the uninterrupted receipt of the rents and profits without account for near forty years is not?" So in Peaceable *v.* Read,[2] Lord Kenyon observed "he had no hesitation in saying where the line of adverse possession begins and where it ends;" and in the late act of 3 & 4 Will. 4, c. 27, § 15, the expression "adverse possession" is used as a recognized term of art. Since the second case of Cholmondeley *v.* Clinton,[3] it has been the settled rule of the court that no relief in equity will be afforded to a party where twenty years have been suffered to elapse from the time at which the right accrued, without any step having been taken to enforce it. In this case the plaintiff claims the assistance of the court to enable him to recover a legal right which accrued upwards of sixty years ago, and without even alleging any disability or showing any reason why he has not sooner attempted to establish his right. The Vice-Chancellor, however, was of opinion that the plea was bad, because it did not state the circumstances of adverse possession so that the plaintiff might know the exact nature of the defence. Had that course been taken, the defendant would have overruled his plea: Thring *v.* Edgar;[4] and this was, in fact, admitted by the Vice-Chancellor himself in his judgment. A plea must be a short point, and the defendant is no doubt bound to raise that point distinctly, so that if the plea be replied to, and come to a hearing, there may be no doubt about the matter in issue. Can there be any doubt here about the matter in issue? We say there has been a possession adverse to the plaintiff since the year 1759, and if he goes to issue upon that plea, and can show that he, or those through whom he claims, have been in possession or in the receipt of the rents and

[1] Cowp. 217.
[2] 1 East, 568.
[3] 1 Turn. & Russ. 107.
[4] 2 Sim. & Stu. 274.

profits since that time, he will be entitled at once to a decree. A negative plea, therefore, is as dangerous to the defendant as it is advantageous to the plaintiff, if the latter is in a situation to prove the fact denied by the plea.

As to the other ground of the Vice-Chancellor's decision, namely, that the plea ought to have been accompanied by an answer to the common charge, that the defendant had documents in his possession which would prove the truth of the matters alleged in the bill, that is inconsistent with the same judge's decision in M'Gregor *v.* The East India Company,[1] where his Honor held that a plea of the Statute of Limitations need not deny the common documentary charge unaccompanied by any distinct allegation that the documents, if produced, would show that the plaintiff's case was within the statute. Here there is no allegation that the production of the documents would show that the plaintiff was not barred by lapse of time; and the matters stated in the bill, to which alone it is charged that the documents relate, show that the plaintiff is barred.

The rule as to double pleading is different in courts of equity from that which is followed in cases at law where double pleading is permitted by the statute,[2] for here, if either plea should be of itself insufficient, we may rest our defence upon both pleas taken together. Gibson *v.* Whitehead.[3] If there is sufficient upon the face of the bill to show that the plaintiff, or those under whom he claims, have never been in possession or in the receipt of the rents and profits, then the second plea will be a good defence, even if the first should be insufficient; and if neither the first nor the second plea should be of itself sufficient, then the two pleas may be taken together, and will constitute a good defence.

Mr. *Knight* and Mr. *Jacob*, contra. In Gibson *v.* Whitehead leave to plead double was given under very special circumstances, and the application was not opposed. That was the first case in which double pleading was allowed in this court, and there is no foundation whatever for the proposition that two pleas can be united for the purpose of constituting a good defence, each of them being separately bad. In fact, the very application for leave to use two pleas shows that they cannot be so united. If either of the pleas can be sustained, the plaintiff's case is out of court; and if they are both bad, it necessarily follows that they must both be overruled. It is an inflexible rule that several matters cannot be joined in one plea, and if two pleas be joined, they become, for the purpose of applying this rule, one plea. The objection to the plea of adverse possession, on the ground that it is not supported by an answer to the documentary

[1] 2 Sim. 452. [2] 4 & 5 Ann. c. 16. [3] 4 Madd. 241.

charge, is fatal. The rule is that a defendant cannot plead to the whole bill and withhold documents in his possession, which, if produced, would fortify the allegations in the bill. In Thring *v.* Edgar[1] the plea of "no debt" was a complete bar to the whole discovery as well as to the relief, and there was no special allegation in the bill seeking the discovery of any circumstances by which the existence of the debt was to be established. The defendant, therefore, overruled his plea by answering as to the debt. In M'Gregor *v.* The East India Company[2] the plaintiff's charge was that the defendant had in his possession papers relating to the matters aforesaid, and by which, if produced, the truth of the matters aforesaid, or of some of them, would appear. Now the matters aforesaid, to which the documents were charged to relate, might well be matters to which the plea had no reference, and the production of which was wholly immaterial; and this was, in point of fact, the case, for the defendant pleaded the Statute of Limitations, and there was no part of the bill which alleged that the promise was made within six years. In the present case there is a distinct allegation in the bill that the defendant Ellames accounted, after the death of the testator's widow in 1815, with her representatives for a moiety of the rents, and, taking that to be the fact, there is an end to the plea of adverse possession since 1759. This, therefore, was an allegation of a material collateral fact, which, according to the authorities, the defendant was bound to negative by answer.

In Emerson *v.* Harland,[3] where to a bill filed by persons claiming title as coheirs of A., *ex parte materna*, and charging that the defendants had frequently admitted by correspondence the plaintiffs' title, the defendants pleaded that another person was the heir of A., *ex parte paterna*, that plea was overruled because the defendants did not support it by an answer denying the correspondence. The second plea in the present case has been twice overruled, and the vice of the first plea is that it does not enable the plaintiff to know the nature of the case which he has to meet.

Sir *E. Sugden*, in reply. Gibson *v.* Whitehead supports the proposition that two pleas, though each of them may be separately insufficient, may be united for the purpose of constituting a good defence; for in that case the court permitted the defendant to plead separately two facts, neither of which alone would have been of the slightest use as a defence to the bill. Thring *v.* Edgar has always been followed; and M'Gregor *v.* The East India Company was not decided, as has been supposed, upon the narrow ground that the defendant had used the words "some of them" in the general charge as to documents, — an expression which is almost always used, — but upon the ground that, as

[1] 2 Sim. & Stu. 274. [2] 2 Sim. 452. [3] 3 Sim. 490.

there was no distinct allegation of a promise within six years, it was unnecessary for the defendant, in pleading the Statute of Limitations, to answer the general allegation as to the possession of documents. The argument on the other side is founded mainly upon the supposition that there cannot be a general statement by way of plea to a number of particular allegations, but that a plea must be so framed as to point out to the plaintiff the nature of the defence which he must make against it. There is no foundation for that supposition. Take for instance a plea of no heir. That is a good plea, because the defendant undertakes to show that the plaintiff has no title as heir, but he is not bound to state how he will show it. He may establish his plea in a variety of ways, as, for example, by showing that the plaintiff is illegitimate, or that he does not belong to the family, or that he claims *ex parte materna*, and that there is a paramount claimant *ex parte paterna;* and it is evident that in such a case the plaintiff is as little informed with respect to the exact nature of the case by which the plea is to be established as he is said to be in the present case.

The Lord Chancellor. This is an appeal from a decision of the Vice-Chancellor, overruling the defendant's pleas to the plaintiff's bill.[1]

I am of opinion that the pleas were rightly overruled.

First, The mere general plea of "adverse possession," and still more a plea not only in those terms, but framed with the extreme generality of this plea, is without any warrant, either from precedents or from the rules of good pleading. The term "adverse possession," though of a known signification, is not used in pleading, and very rarely, I think only once or twice very recently, in the language of the statutes.[2] It is a relative phrase, and it means such possession as is inconsistent with another's right, but it may consist in various things, and nothing can be more vague than an averment in bar of a right claimed by A. that the thing over which it is claimed has been in a possession adverse to that right, without setting forth by whom or how and in what manner such alleged possession has been adverse. This plea gives no information to the party claiming, no notice of the defence he is to meet and against which he is to prepare himself; for it may consist in various things, none of which are specified, and he is left to mere conjecture.

It was at one time doubted by Lord Thurlow whether a negative plea was good; at least he held in Newman v. Wallis[3] that a plea of "no heir" was bad without averring who was the heir, but afterwards, in Hall v. Noyes,[4] he altered this opinion on the ground that the defendant might not be able to show who was the heir, though he might prove that the plaintiff was not. But in that case the plea leaves the

[1] His Lordship's statement of the pleadings has been omitted. — Ed.

[2] 3 & 4 Will. 4, c. 27, § 15. [3] 2 Bro. C. C. 143. [4] 3 Bro. C. C. 483.

plaintiff in no uncertainty as to the point of defence, and raises an issue the affirmative of which is easily perceived, and at once refutes the negative issue of the plea. Upon such a plea as we have here the plaintiff could not go to proof with any precise knowledge of what he had to meet, and might never discover it till he saw the defendant's evidence. It is not very easy to put a case of such a plea as this at law, because in ejectment, as the plaintiff must recover on the strength of his own title, and the Statute of Limitations is a bar to the right, and not merely to the remedy, it is not specially pleaded. But suppose it were, I cannot doubt that it would be bad to plead merely that there had been continually, for more than twenty years before the demise in the declaration, a possession adverse to the title of the lessor of the plaintiff. The analogies of all the cases in courts of equity are on these principles against such a plea. In Carleton *v.* Leighton [1] the defendant pleaded a commission of bankruptcy duly issued, under which the plaintiff was duly found and declared a bankrupt, and thereupon his estate and effects were duly assigned and transferred; yet this was held a bad plea of bankruptcy, because it did not state successively and distinctly the material facts, but was in general language. Nor were the averments of the commission being duly issued, and bankruptcy duly found and declared, held sufficient to exclude the possibility of the plaintiff not being in fact a bankrupt.

In Jones *v.* Davis [2] the bill was for an account of stones taken from the plaintiff's quarry, upon promise by the defendant to keep an account of them and to pay accordingly; and it alleged repeated assurances of the defendant affirming that such account was kept. The plea was held bad for not denying the fact of such account being kept, though it denied that any promise was made to pay or to keep an account, or any thing to that effect; and it was held bad on the ground that the keeping an account would have been evidence to go to a jury of a promise or agreement such as that stated in the bill: yet it is to be observed that the fact of the promise or agreement is denied by the plea, and that the keeping the account is not alleged in the bill at all, but only a statement made by the defendant, which might have been untrue. And then, though on another ground, that of fraud, the plaintiff might have prevailed, yet to the issue of agreement or not, that was not material. Again, in Evans *v.* Harris [3] the court held a plea of the Statute of Frauds to be bad, denying explicitly any agreement in writing by defendant or any one authorized by him, or any memorandum or note in writing, because it did not also deny circumstances alleged in the bill as evidence of such an agreement. In Burslem *v.* Burbidge,[4] in the

[1] 3 Mer. 667.
[2] 16 Ves. 262.
[3] 2 Ves. & Bea. 361.
[4] 4 Gwill. 1524.

Exchequer, a plea to a bill for tithes was held good which set forth that they had belonged to a dissolved monastery, and had been granted by divers mesne conveyances from 31 Hen. 8, when they were vested in the Crown, downwards till they became vested in the plaintiff, the objection being that the conveyances should have been set out; but this would not have been necessary in pleading at law, and the plea was abundantly certain, and the defence which it disclosed sufficiently plain and precise. When it is sometimes said that the rules of pleading in this court are less strict than at law, and that the pleadings here may be more loose, perhaps such decisions as these may serve to show that, regard being had to the nature of proceedings in equity and their great and leading objects, among others that of securing discovery to the plaintiff and preventing the defendant from evading the right to wring his conscience, the strictness of our rules is to the full as great on this side of the Hall as on the other.

In the present case the bill alleges among other things the possession of Jane Hardman and her representatives as trustees, from the death of J. Hardman senior down to 1815; and the possession of Jane Hardman's representatives is denied by the second plea. But Ellames is averred in the bill to have accounted for the rents and profits to her representatives, and that, according to the purport of the authorities I have cited, ought to have been denied, which it is not.

The denial of this allegation that Ellames accounted to Jane Hardman's representatives is the more material, because that allegation goes to negative the first plea of adverse possession; for either the trusts on which Jane Hardman and her representatives were in possession (and Jane's possession at least is not denied at all) were not fully performed when Ellames accounted to them for the rents and profits, or they were. If they were not, the adverse possession could not have begun, and if they were, then Jane and her representatives were trustees for whoever was entitled to the estate, and consequently for the plaintiff, if the title was in him. According to all the authorities, then, this allegation ought to have been met. Further, the denial of the representatives being in possession is quite consistent with the claim made in the bill to the rents and profits received by the two Jane Hardmans, and not applied by them. There is no averment in the plea that all those rents and profits were applied to the purposes of the trust; and therefore the second plea only goes to restrict the amount of the claim, and not to cut it altogether down.

Then neither of the pleas meets the statement touching the documents and writings charged to be in the possession of the defendants, and also charged as proving not only generally the several matters in the bill, but more particularly as showing that the two Jane Hardmans obtained

possession of the estates under the term upon the trusts of that term. It was said that, upon the authority of M'Gregor v. The East India Company,[1] it was unnecessary to deny this allegation as to writings, and that his Honor was of an opinion in that case different from his ruling in this. It appears, however, not only that the two cases are reconcilable, but that M'Gregor v. The East India Company materially supports the present decision, for his Honor there held that a plea of the Statute of Limitations needs not deny the possession of documents when that possession would be immaterial from there being no allegation that these documents would show any thing which negatived the matter of the plea, that is, a promise within six years; and upon looking to the bill, we find it only alleged in the usual way, when a mere general charge is made as to such writings, that "from the documents the several matters aforesaid or some of them would appear." But here the averment is specific, that some thing would appear inconsistent with at least one of the pleas, — that of adverse possession since the nephew's death in 1759, for Jane Hardman the widow only died in 1795, according to the statement of the bill. Consequently, on the authority of M'Gregor v. The East India Company, as well as of James v. Sadgrove,[2] and other cases, it ought clearly to have been denied that there were such writings in the possession of the defendant.

The cases of Sanders v. King[3] and Thring v. Edgar,[4] decided by the Master of the Rolls upon similar principles, do not appear to me in the least inconsistent with the present determination. In the former it was held that [illegible] circumstances as evidence of that title, a plea negativing the title does not protect the party from answering as to those circumstances, being nearly the doctrine laid down in two of the cases which I have cited before; and in Thring v. Edgar it was held that when the defendant, in the answer accompanying a negative plea, goes beyond denying the facts specially charged as evidence of the plaintiff's title, he overrules his plea. But it is not at all inconsistent with this, to hold that where facts have been charged inconsistent with the plea itself, negativing that negative plea by anticipation, as it were, and thus supporting the plaintiff's title, the traversing those averments, and thereby supporting the plea, is safe, and does not overrule the plea. This would be sufficient to show that Thring v. Edgar is consistent with the present decision; but the other cases which I have referred to show not only that so answering does not overrule the plea, but that without such denials the plea itself is bad. Indeed, strictly speaking, the one proposition is involved in the other.

[1] 2 Sim. 452.
[2] 1 Sim. & Stu. 4.
[3] 6 Madd. 61.
[4] 2 Sim. & Stu. 274.

EMERSON *v.* HARLAND.

BEFORE SIR LANCELOT SHADWELL, V. C. MAY 4, 1830.

BEFORE LORD LYNDHURST, C. AUGUST 9, 1830; MARCH 2, 1831.

IN THE HOUSE OF LORDS. 1834.

[*Reported in* 3 *Simons*, 490, *and in* 8 *Bligh*, 62.]

THE plaintiffs, by their bill, claimed to be entitled to one undivided third part of certain estates in Yorkshire, as the coheirs *ex parte materna* of one Ann Trigg, and prayed that it might be declared that they were so entitled; that accounts might be taken of the estates, and of the rents received by the defendants since the death of Ann Trigg, and that a partition of the estates might be made between the plaintiffs and the defendants.

The bill charged (*inter alia*) that the defendants had frequently, by correspondence and otherwise, admitted the title of the plaintiffs to said estates or some part thereof, and that they had corresponded together, and with various persons, relative to the facts and circumstances set forth in the bill, and in such correspondence said facts and circumstances, or some of them, had been admitted or noticed; and that the defendants had now, or lately had, in their possession or power, the title-deeds and evidences of title of said estates, or some of them, or some part thereof, and also divers other deeds, writings, evidences of title, accounts, books of account, letters, notes, copies of or extracts from letters, notes, vouchers, documents, papers, and writings, of or relating to said estates, or some of them, or to the share and interest of the said Ann Trigg therein, and relating to the rents and profits of said estates, which had accrued since the death of the said Ann Trigg, or relating to the several matters in the said bill contained, from which, if produced, the truth thereof would appear.

The defendants put in a plea in the following words: "That Lois, the wife of Timothy Morine of Wetherby, in the county of York, gentleman, formerly Lois Harland, was, at the death of Ann Trigg in the said bill named, and now is, heir-at-law of the said Ann Trigg, *ex parte paterna*, of the whole blood, which the defendants aver to be true and are ready to prove," &c.

Neither Lois Morine nor her husband were parties to the suit.

The *Solicitor-General*[1] and Mr. *Swanston*, in support of the plea, said that the plea, as framed, tendered a sufficient issue, although it did not set forth the pedigree of Lois Morine: that this was an affirmative plea; and that it was improper that a plea should state evidence of the fact pleaded.

Mr. *Knight* and Mr. *Spence*, in support of the bill, said that it was incorrect to plead, generally, that a person was heir; that the pedigree of Mrs. Morine ought to have been set forth; that heirship was not a fact, but a conclusion of law: Gun *v.* Prior,[2] Sanders *v.* King,[3] Thring *v.* Edgar;[4] that the bill charged that the defendants had frequently, by correspondence and otherwise, admitted the plaintiff's title, and the plea ought to have been accompanied with an answer to that charge.

The *Solicitor-General*, in reply, said that the admission, by the defendants, of the plaintiff's title, was a collateral fact; that the plaintiffs were put out of court by the defendants showing that the title to the estate was not in them, but in another person; that no admission by the defendants would give the plaintiffs a title; that, if the defendants had answered the charge in question, they would have overruled their plea.

The VICE-CHANCELLOR. I think that the defendants should have supported their plea by an answer denying the correspondence; and, on the ground that they have not done so, I overrule the plea.

The defendants appealed from the foregoing decision to the Lord Chancellor, who, on the 2d of March, 1831, delivered the following judgment in writing: —

"In the case of Emerson *v.* Harland, I am of opinion that the plea was properly overruled, and that there are parts of the charge in the bill which require the plea to be accompanied with an answer and discovery, according to the principle laid down in Saunders *v.* King, 6 Madd., and Gun *v.* Prior, 1 Cox."

The original defendants then appealed to the House of Lords.

For the appellants, Mr. *Swanston* and Mr. *Wigram*. This is an affirmative plea, the truth of which the pleader undertakes to verify. Until the truth or falsehood of the plea appears, no further answer can be required. If true, it is a bar to the claim, and the bill must be dismissed. The appellants by this plea seek to protect themselves against the expense in which they would be involved by answer. This is the principle of the rule laid down by Lord Redesdale in his treatise.[5] The mischief of compelling discovery where the case may be reduced to one point is illustrated in the same book.[6] Lord Thurlow at first over-

[1] Sir E. B. Sugden. — ED. [2] 1 Cox, 197. [3] Madd. & Geld. 61.
[4] 2 Sim. & Stu. 274. [5] P. 283, 4th ed. [6] P. 280.

ruled a negative plea,[1] but afterwards doubted[2] of the correctness of that decision, from the consequence of permitting a party, by alleging a false title, to compel a discovery of private transactions. Since the time of Lord Thurlow negative pleas have been always allowed.[3] This is an affirmative plea, but it is argued that it must be supported by an answer. Now this plea puts in issue whether the plaintiff is heir, and any answer as to the evidence of that fact would overrule the plea, according to the practice and rule as stated by Lord Redesdale.[4] This plea was overruled on the authority of cases,[5] the correctness of which we do not dispute, but they are inapplicable to this bill and plea. In the bill in this case there is no special charge of facts as evidence of the plaintiff's title. General allegations will not entitle a plaintiff to a discovery.[6] As to the documents of title, the question is upon motion for the production. The rule as to the form of plea appears by the decision in Thring *v.* Edgar, where it was held that an answer to the allegation covered by the plea overrules it. That the facts of which discovery is sought must be specially charged *as evidence* of the plaintiff's title, appears in Pennington *v.* Beechey,[7] and later cases[8] confirm the rule more forcibly. Where fraud is charged, or an allegation made, which, if true, would destroy the plea, that charge or allegation must be answered. But this is not such a case.

The plaintiff may be entitled to a discovery of all facts which make out his own case, not of those which make out the defendant's case. He has no right to inquire into the grounds of, or to fish out the evidence for the defence, which this bill seeks. The question raised by the plea is, whether a third person has a title which would displace the alleged title of the plaintiff. If the defendants do not make out the affirmative fact alleged in their plea, the title of the plaintiffs, as heirs *ex parte materna*, is admitted by the form of the plea. The possession of documents which show that title as charged by the bill is also admitted by the plea, and no discovery is wanted.

For the respondents, Mr. *Knight* and Mr. *Spence*. This is a mere question of title, not of forfeiture or crimination. The party under whom the plaintiffs claim was seised as a purchaser. They claim as heirs on the part of the mother; and in deducing the title from that person, it is indispensable to show that there is no heir on the part of the father. The plea to meet that case is, that there exists an heir on

[1] Newman *v.* Wallis, 2 Bro. C. C. 142. [2] Hall *v.* Noyes, 3 Bro. C. C. 483.

[3] Drew *v.* Drew, 2 Ves. & Bea. 159; Saunders *v.* King, 6 Madd. 61; Thring *v.* Edgar, 2 Sim. & Stu. 274.

[4] P. 299.

[5] Gun *v.* Prior, 1 Cox, 197; Saunders *v.* King, 6 Madd. 61.

[6] Jones *v.* Jones, 3 Mer. 161; Freitas *v.* Dos Santos, 1 Y. & J. 574.

[7] 2 Sim. & Stu. 282.

[8] Tarleton *v.* Hornby, 2 Younge, 172; Hardman *v.* Ellames, 2 M. & K. 732

the part of the father; and yet it is argued that it is not a negative plea. As to the charge that the defendants, in correspondence with each other and third persons, have admitted the title of the plaintiffs, it is contended that the usual words, "that as evidence of the title," &c., are not added to the charge. But if it appears by necessary construction that they are evidence, it cannot be requisite to add the mere form of the words; and it is settled by many authorities [1] that if facts are charged by the plaintiff in his bill, which are evidence of his title, the defendant cannot by plea refuse a discovery as to those facts. Where a bill charged that an account was kept, although it omitted the words "as evidence of the agreement," a plea not accompanied by an answer denying the fact of keeping the account was overruled. The principle is, that if the bill charges collateral facts which in their nature must be evidence of the title on which the plaintiff stands, these charges must be answered. If there is in the bill any allegation which, if admitted, might be used to disprove the plea, the defendant cannot by plea protect himself from that discovery.

Mr. *Wigram*, in reply. The admission of a party as to the title of another cannot be the subject of discovery. It cannot be used as an admission. In Evans *v.* Harris and Jones *v.* Davis special facts were charged as evidence of the plaintiff's title, and not affecting an affirmative issue, as in this case, which the defendant had taken upon himself to prove. If the common form of charge as to books and documents will entitle a plaintiff to discovery, notwithstanding such a plea, all the mischief contemplated and explained by Lord Redesdale in his treatise will be admitted.

In the course and at the conclusion of the argument, the LORD CHANCELLOR [2] made the following observations: —

There was a case [3] in which the defendants were allowed to put in a double plea: first, that the assets were personal; and, secondly, if real, then that the party was a trader at the time of his death. This is contrary to the established rule of pleading, and I think has been overruled.

In this case the defendants plead, in substance, that the plaintiffs are not heirs, and propose to falsify the title which they set up as heirs *ex parte materna*, by proving that there is in existence an heir *ex parte paterna*. But is the case made by the bill in the particulars charged one which would be capable of proof or illustration by the disclosure of facts, of which a discovery is sought by the bill? It is urged on general principles that discovery ought not to be compelled, if on proof of the matter of the plea it will appear that the plaintiff has no

[1] Evans *v.* Harris, 2 Ves. & Bea. 361; Jones *v.* Davis, 16 Ves. 262; Thring *v.* Edgar, 2 Sim. & Stu. 274.

[2] Lord Brougham. — ED.

[3] Gibson *v.* Whitehead, 4 Madd 241.

title. But if the title would in part be proved by discovery of the fact charged, does not that raise a distinct case, and form a ground of exception? Can a defendant to such a bill suppress or evade the discovery by a simple denial of the title generally? That cannot be the office of a negative plea, or of any plea.

I purpose to take a little time to consider the authorities cited, particularly Hardman *v.* Ellames, a case which I decided after much consideration. At present I am disposed to advise the House to affirm the judgment.

The LORD CHANCELLOR. — This was a question arising entirely upon the pleadings in the cause, and though I had little doubt at the time, as I then stated, and inclined strongly to the opinion of the court below, for the reasons I shortly threw out, in the course of Mr. Knight's argument, who appeared as counsel for the respondent, yet I took the liberty of delaying the further proceedings in the cause until I should be enabled to look into Hardman *v.* Ellames, which lately gave rise to a good deal of discussion in the Court of Chancery, and in which I had the misfortune to differ from the court below. I have since that looked into all these cases, Hardman *v.* Ellames, Thring *v.* Edgar, and Saunders *v.* King, decided by the same learned judge. I have also looked into Jones and Davis, Newman and Wallis, and other cases. Newman *v.* Wallis was a plea of no heir, which Lord Thurlow held bad, but he changed his opinion upon that subject. In a subsequent case, Hall and Noyes, he admitted he was wrong, and took a new view of the subject. The East India Company and M'Gregor[1] is another case. I have gone through the whole of these cases, because, as I differed with the court below in Hardman and Ellames, I thought possibly, on a reconsideration of the case, I might change that opinion. I have risen from the discussion and view of the cases greatly confirmed in the opinion I had in Hardman and Ellames, and although it has no very immediate reference to, nor is it decisive of, the present, I thought it might let in some light on the present case. I found a consistency in principle in all these cases, and where they differ the one from the other, the doctrine and practice must generally be considered as settled by the last decision. I find no reason whatever to doubt the judgment which has been pronounced by the courts below. The case was twice decided, first by the Vice-Chancellor, and secondly by Lord Lyndhurst, who immediately afterwards quitted the Great Seal, and who was, by the consent of the parties, allowed to deliver his judgment in writing; it stands dated, for regularity's sake, on 22d of November. I move your Lordships that this appeal be dismissed, and the judgment affirmed with costs, the costs not to exceed £150. *Judgment affirmed.*

[1] 2 Sim. 142.

JERRARD v. SAUNDERS.

BEFORE LORD LOUGBOROUGH, C. JUNE 12, 1793.

[*Reported in* 2 *Vesey, Junior*, 187.]

THIS bill was for discovery of deeds relating to the plaintiff's title, and to restrain proceedings in ejectment. The bill charged constructive notice, in the party under whom the defendant claimed, of a settlement, under which the plaintiff claimed, from a transaction in which the deeds, the discovery of which was sought, were delivered. The defendant pleaded purchase for valuable consideration, and averred that J. D., under whom he claimed, had not to his knowledge and belief any notice of the title set up by the plaintiff; but he did not answer the facts charged as affecting him with notice.

LORD CHANCELLOR. Is not the plea very novel in the manner of pleading? The defendant denies to his knowledge and belief any constructive notice in the person under whom he claims. He must answer to the facts which constitute notice.

Mr. *Lloyd*, for the plaintiff. He must answer directly as charged by the bill. He has brought an ejectment, and, being out of possession, he pleads purchase for valuable consideration. That he cannot do.

LORD CHANCELLOR. He must set forth the facts charged in the bill, from which the court will construe notice, particularly whether the title-deeds were delivered. He assumes to himself the proposition. He judges what is constructive notice, and then denies that, to his knowledge and belief, he had constructive notice. The bill does not impute direct notice to him. It is consistent with every thing he says in answer, that the very settlement itself might have been delivered. He must let the court judge of that. The plea must be disallowed.

DENYS v. LOCOCK.

BEFORE LORD COTTENHAM, C. JUNE 23, AND JULY 4, 6, 7, 29, 1837.

[*Reported in* 8 *Mylne & Craig*, 205.]

THE case is sufficiently stated in the judgment.[1]

Mr. *Wigram* and Mr. *Loftus Wigram*, for the plaintiff.

Mr. *Jacob* and Mr. *Richards*, for the defendants.

The LORD CHANCELLOR. This case came before me on an appeal from an order of the Vice-Chancellor, allowing a plea. The bill, which is very long, makes a claim to a sum of £10,000 stock; and, without stating more of the substance of the bill than is necessary in order to explain the view which I take of these pleadings, the bill alleges that Lady Charlotte Denys, the mother of the plaintiff, being possessed of certain other property, and having power of disposing of other property, in the year 1833 made a codicil, giving to the plaintiff a certain interest in a sum of £10,000 stock. It appears that subsequently a codicil was made in the year 1834, which diminished or altered the interest which the plaintiff would take in that sum of stock; and finally a codicil was made in April, 1835, depriving the plaintiff, on the face of the codicil, of all interest in that stock, and giving it to the defendant, Lady Shuckburgh. Now the bill alleges that at the respective times at which the codicils of 1834 and 1835 were executed, the defendant represented to the testatrix that she (the defendant) had made up her own mind, and was determined to make a provision for the plaintiff herself, and particularly that previously to the execution of the codicil of 1835 she expressly promised the testatrix that if the testatrix would execute that codicil she would provide for the plaintiff with regard to the £10,000 in the same manner as had been provided for him by the codicil of 1833, and upon that the equity is founded, namely, that the defendant having obtained the execution of this codicil from the testatrix on a promise to deal with the money which passed by that codicil in the manner stated, for the benefit of the plain-

[1] In the original report the pleadings are stated at great length, but it is believed that it would only encumber the case to include them here. — ED.

tiff, a trust is created, and that the plaintiff therefore has a right against this legacy of £10,000 to have that trust carried into execution for his benefit.

Now the bill for this purpose, and in order to raise the probability of the story, states very many circumstances for the purpose of establishing the very great influence which the defendant had obtained over the testatrix, and also the great kindness which the testatrix felt towards the plaintiff, in order to show the great probability of the testatrix not having revoked that previous disposition, without providing some means by which the plaintiff might derive the benefit of the gift, and these are extended over a very long statement in the bill; all, however, having a tendency to establish some one or other of the propositions which would go to show the probability of what the plaintiff alleges, namely, this contract on the faith of which the codicil was executed. To some of the allegations of this bill I shall have occasion to refer more particularly. The bill so constituted, and after having set out the title and the ground on which this property was claimed, prays that it may be declared that the sum of £10,000 3½ per cent. bank annuities and the dividends thereof, as from the death of Lady Charlotte Denys, were and are subject to a trust corresponding with the directions and provisions of the paper writing of the 2d of August, 1833, and that proper persons may be appointed trustees of that sum, and that the same may be transferred into the names of such trustees, and that Sir Francis and Lady Shuckburgh may be decreed to account for the dividends, and so on, not praying any thing with regard to the codicils, for the purpose of setting them aside, or affecting them, but seeking, on the whole statement in the bill, to create a trust, on which the plaintiff rests his title to the sum of £10,000; and, undoubtedly, if the facts are made out as they are stated in this bill, with respect to which I have no means of judging one way or the other, there is, on the face of the bill, that which would constitute a trust; there is an allegation of a codicil having been executed for the benefit — apparently for the benefit — of the defendant, on an express promise that the money so bequeathed should be used in trust for the plaintiff.

Now to this bill containing an infinite variety of allegations, all tending to establish or support some part or other of the propositions on which the plaintiff rests his title to the £10,000 stock, the defendant has pleaded. I should first state the allegation in the bill as to the promise, which is twice repeated, but repeated very much in the same words. The allegation is that Lady Charlotte Denys was extremely unwilling to execute the paper writing of the 12th of March, 1834, the codicil of the 29th of March, 1834, and the codicil of the 14th of April, 1835, respectively, and that in order to induce her so to do,

Lady Shuckburgh, previously to the execution of the same instruments respectively, and in particular previously to the execution of the codicils of the 29th of March, 1834, and the 14th of April, 1835, from time to time represented to Lady Charlotte Denys that she, Lady Shuckburgh, had always intended, out of the benefits which she was to derive under the will and codicils of Lady Charlotte Denys, to make some considerable provision for the plaintiff and his family, and before the execution of the codicil of the 14th of April, 1835, she, Lady Shuckburgh, expressly and in terms promised Lady Charlotte Denys that if she would, as she (Lady Shuckburgh) desired, execute the last-mentioned codicil, she would apply the said sum of £10,000 stock for the benefit of the plaintiff and his children, according to the provisions of the paper writing of the 2d of August, 1833; that Lady C. Denys believed such representations and promises of Lady Shuckburgh, and that she executed the paper writing of the 12th of March, 1834, and also both the codicils of the 29th of March, 1834, and the 14th of April, 1835, and particularly the last-mentioned codicil, in reliance on the truth of such representations, and on the faith of the said promises.

This allegation is repeated afterwards in the charging part of the bill, very much, I believe, in the same terms, — certainly so much in the same terms as not to depart from it in any material particular. Now here is a bill, therefore, the equity of which rests on that promise. Other circumstances are stated throughout the bill leading to the conclusion that such a promise might have been made, or probably had been made, aiding, therefore, the object which the plaintiff has in view, namely, to establish the fact of such a promise having been made.

The plea is to all the bill except certain parts; then it proceeds to except certain passages which are obviously excepted for the purpose of taking from the bill those allegations which it was supposed by the pleader were introduced for the purpose of establishing the affirmative of what the bill alleges, and therefore he very properly excepted them from the bill, inasmuch as where the bill alleges a fact, and alleges other circumstances calculated and tending to prove that fact, you cannot plead the negative of the fact without denying those allegations in the bill which have a tendency to prove that fact, and whatever you do not exclude and deny is considered as admitted to be true, and therefore you admit the allegation tending to establish the proposition, although you deny the proposition itself. I admit the plaintiff has a right to discovery by answer in support of the plea as to those circumstances which, if admitted, would exclude the validity of the plea.

So far, therefore, the frame of the plea is undoubtedly correct; whether it goes far enough, whether it excludes all the statements that

are introduced and to be found on the face of the bill for that purpose, is a matter which I do not at the present moment consider. It excludes, however, two passages in the bill, the first of which is in these words. "Whether, in order to induce," — these are the excepted passages to which the plea does not apply — "whether, in order to induce Lady Charlotte Denys in the said bill named to execute the paper writing and codicils in the said bill in that behalf mentioned respectively, or some or one and which of them, this defendant, Dame Anna Maria Draycott Shuckburgh, did not, previously to the execution of the same instruments respectively, and whether or not in particular before the execution of the codicils in the said bill in that behalf mentioned, or when else, from time to time, or at some and what time, represent to the said Lady Charlotte Denys that she, this defendant Dame Anna Maria Draycott Shuckburgh, had always intended, out of the benefits which she was to derive under the will and codicils of the said Lady C. Denys, to make some considerable provisions for the plaintiff and his family, or how otherwise." That is excepted. Now certainly that is not the foundation of the equity, for the equity does not rest on Lady Shuckburgh having represented that she had intended, out of the benefit which she might derive from her mother, Lady C. Denys, to make a provision for the plaintiff; but, undoubtedly, it is a material allegation in the bill as tending to show that the testatrix relied on some promise from the legatee in favor of the plaintiff, and therefore the pleader very properly excepts out of it those allegations. Then, however, the plea goes on thus: "And whether, before the execution of the codicil of the 14th day of April, 1835, in the said bill in that behalf mentioned, she, the said Lady Shuckburgh, expressly and in terms promised the said Lady C. Denys that if she would as she, the said Lady Shuckburgh, desired, execute the last-mentioned codicil, she would apply the sum of £10,000 stock for the benefit of the said complainant and his children, according to the provisions of the paper writing of the 2d day of August, 1833, in the said bill in that behalf mentioned, or to some and what other purport or effect; and whether the said Lady C. Denys did not believe such representations and promises of the said Lady Shuckburgh in the said bill alleged, or how otherwise; and whether the said Lady C. Denys did not execute the paper writing and the codicils in the said bill in that behalf mentioned, or some or one and which of them, and whether or not particularly the codicil in the said bill in that behalf mentioned, in reliance on the truth of such alleged representations, and on the faith of the said alleged promise, or how otherwise." Now that is the substance of the equity; that is the alleged promise on the faith of which it is alleged that the codicil was executed. The result, therefore, is, that the plea, having excepted the promise upon

which the whole equity rests, goes on, after excepting certain other passages, to plead the negative: "Do plead in bar, and for plea say, they deny that before the execution of the codicil of the 14th of April, 1835, in the said bill in that behalf mentioned, or at any time, she, this defendant Dame Anna Maria Draycott Shuckburgh, expressly or in terms, or in any manner promised, represented, or stated to Lady C. Denys in the said bill named that if she would execute the said last-mentioned codicil, she, this defendant, Dame A. M. D. Shuckburgh, would apply the sum of £10,000 stock in the said bill mentioned, or any part thereof, for the benefit of, or hold the same, or any part thereof, upon trust for the said complainant and his children, or any or either of them, according to the provisions of the paper writing of the 2d day of August, 1833, in the said bill mentioned, or according to any other provisions, or in any other manner."

The plea negatives, therefore, the allegation of the promise. What I particularly observe upon is, that first it takes out of the bill the allegation of the promise, and then denies it. Now I apprehend that is not correct, and that no such plea can be supported. A negative plea is a mere traverse; it differs from an ordinary plea inasmuch as the ordinary plea admits the truth of the bill, but states some matter *dehors*, which destroys the effect of the allegation, and which, assuming the allegation to be true, would be a defence. A title to an account or a title to a sum of money, perfectly good on the face of the bill, may be met by a plea stating a release. It is quite consistent with the whole statement in the bill; it admits the statement to be true, but states that which, if established by evidence, will displace the title of the plaintiff. A negative plea, however, is a mere traverse of that which constitutes the plaintiff's title. Now to traverse that which is not alleged on the face of the bill, — to take out of the bill an allegation, and then by plea to negative the allegation, — is a mode of proceeding which leaves the record in a state which renders it impossible for the court afterwards to deal with it.

Several objections were taken to this plea. It was objected, first, that the plea does that which I have now observed upon, — excepts the alleged promise, and then traverses the allegation. And it was also objected that the bill contained statements which are not excluded, and which tend to establish the truth of the case made by the bill. A great variety of decided cases were referred to in the course of the argument, and I can find not one of them in which a negative plea has been so framed, with the exception of Thring *v.* Edgar;[1] and it is very singular that in that case the plea seems, as far as one can judge from the statement of the report, to have adopted the same course, and, be-

[1] 2 Sim. & Stu. 274.

ing a negative plea, to have excepted from the bill the allegation which it was intended to traverse; and it is very singular that in that case Sir John Leach did not advert to, and probably was not aware of the fact that that was the shape and frame of the plea, because he speaks of the answer overruling the plea. Now the answer cannot, strictly speaking, be said to overrule the plea, when the plea and answer are to distinct and several matters; but if that learned judge had been aware that in the bill, as pleaded to, there was no such allegation as that which was traversed, the objection would have been equally valid, although not rested precisely on the same ground. Now it is singular enough that that case was decided without adverting to the fact that the plea took out of the bill the allegation intended to be traversed; and, perhaps, it is as singular that in this case the Vice-Chancellor, when he decided it, certainly was not aware that such was the frame of this plea. I not only have that from a note of his judgment, with which I have been furnished, but I have very good reasons for knowing that, in point of fact, he was not aware that that was the shape of the plea; and if he had been aware of the shape of the plea, I have not the least doubt, instead of giving effect to the plea, he would have overruled it. Now he states in the note which has been furnished to me of his judgment, that his opinion is that the plea is perfectly good, and that it appears to his Honor that there is no one point whatever by means of which any relief can be had in equity, except by means of the point which consists of the averment of the fact of the promise, and therefore that the denial by the plea of that promise does effectually displace the plaintiff's equity; and that he was also of opinion that the mode in which the plea is drawn is right, because the plea does not profess to be a plea to the whole bill, and so answer something which in terms it professes to cover, but that it is a plea to all the bill, save and except so much of the bill as in effect relates to the promise. Now, in point of fact, the bill to which the plea pleads contains no allegation of promise at all; and the only way of trying how that would operate is to suppose issue to be taken on the plea; how would it be to be tried? It would be an issue taken on the traverse only, on the negative of that which nobody has affirmed. This is an entire novelty, of which there is no instance except the case of Thring *v.* Edgar, to which I have referred, in which I think it is quite obvious that the judge was not aware that it existed. It is quite obvious that he was not aware that, strictly speaking, the plea and the answer were not to the same matter, and that therefore there could be no overruling of the answer by the plea, but it is equally clear that if he had been aware that the plea had taken out of the bill that which constituted the equity, namely, the matter traversed, he would not have considered the plea as good.

Independently, however, of this objection, after looking through this long bill with every possible attention, I am quite satisfied that this plea does not take out of the bill one twentieth part of that which ought to be taken out before the plea can be allowed; for every allegation not taken out of the bill is admitted, and the plaintiff has a right to state circumstances leading to the conclusion on which his equity is founded, and has a right to have a distinct answer as to all those circumstances. That is not disputed; it is clearly laid down in Jones *v.* Davis,[1] Evans *v.* Harris,[2] and Hardman *v.* Ellames.[3] The plea has attempted to do that which in this case seems to have been utterly impossible, and in very few cases is possible, namely, to a bill so constituted as this is to plead to part and answer to part; for unless it can be clearly shown that the allegations which are pleaded to do not tend to that conclusion which the plaintiff seeks to establish, the defendant cannot support a negative plea by leaving unanswered and admitted allegations which go to establish the issue upon which the plaintiff's equity rests. It would be occupying a great deal more time than is at all necessary if I were to go through the various allegations which I have marked as coming, in my opinion, within that rule; but there are one or two which seem to me to put the fact so entirely beyond all doubt, that I will just advert to them. For instance, the bill says: "And as further evidence of the matters aforesaid, your orator charges that both the said codicils of the 29th day of March, 1834, and the 14th day of April, 1835, were made at the suggestion of the said Lady Shuckburgh, and that the contents and effect thereof were suggested by her, and that she gave instructions or directions for the same to the said Henry Francis, and that he received his instructions or directions for the same from her." It is true that that does not go to the whole case; it does not prove the promise; but, if there is any doubt in the case, it is obvious that this is a very important matter, which may operate very much in favor of the plaintiff's claim. Then the bill charges "that the truth of the matters aforesaid would further appear if the defendants hereto would state and set forth, as they are able and ought to do, with whom the idea or design of the said alleged codicil of the 14th day of April, 1835, originated, and whether the idea or design of the same did not in truth originate with the said Lady Shuckburgh." Then it goes on with a long passage, enumerating a variety of circumstances connected with the preparation of that codicil for the purpose of showing that the whole scheme of that codicil was hers, and that it did not originate with the testatrix herself. Then there is a charge "that the defendants respectively have at various times written letters to, or had other written communications with, each other, and

[1] 16 Ves. 262. [2] 2 Ves. & Bea. 361. [3] 5 Sim. 640.

with various other persons, and have at various times received letters or other written communications from each other, and from various other persons, touching, or concerning, or relating to, the matters aforesaid," — the matters aforesaid being the contract, and all the circumstances connected with it — "or some of them, or which it would be advantageous for your orator to see, with reference to his claim in this suit." Now that is admitted, for it is not excluded. The defendants, therefore, admit that they are in possession of letters which would tend to establish the facts stated on behalf of the plaintiff. Then the bill goes on in another passage to allege that the defendants are in possession of "certain drafts of such codicil, certain fair copies of such drafts, certain instructions for the said codicil of the 14th day of April, 1835, certain memoranda relating to the same." That they admit, and these documents they also by the plea endeavor to protect themselves from producing.

On these two grounds, either of which I conceive is sufficient, I apprehend this plea is bad in point of form. I certainly have the satisfaction of knowing that if the case had been presented to the Vice-Chancellor's mind in the way in which it has been brought before mine, it would have met with a very different result. I am clearly of opinion that the plea ought not to have been allowed, and that the order now made must be to overrule it; and I am equally clear that, having regard to the frame of this bill, there is an utter impossibility of making any such plea an effectual defence, and therefore it is perfectly useless to give the defendant an opportunity of pleading again, so as to avoid those difficulties in which the case seems to be inextricably involved by the mode in which the bill is framed. *Plea overruled.*

PLUNKETT v. CAVENDISH.

BEFORE SIR JOHN LEACH, V. C. NOVEMBER 2, 1824.

[*Reported in* 1 *Russell & Mylne*, 713.]

THE bill stated that Sir William Lowther, by his will dated in April, 1755, devised certain real estates in the county of Lancaster to the Duke of Devonshire and the Marquis of Hartington and their heirs, to the use of the testator's first and other sons successively in tail male; remainder to the use of Edward Wilson and Thomas Wilson for a term of 200 years, upon certain trusts; remainder to the use of Catherine Lowther for life; remainder to the use of Lord George Cavendish for life; remainder to trustees to preserve contingent limitations, and then to Lord George's first and every other son successively in tail male; in default of such issue, to the use of Lord Frederick Cavendish for life; with remainder to trustees to preserve contingent limitations, and then to Lord Frederick's first and other sons successively in tail male; in default of such issue, to the use of Lord John Cavendish and the heirs male of his body; and, in default of such issue, to the testator's own right heirs: that the testator died in 1756, leaving no issue: that in 1764 Catherine Lowther died: that Lord George Cavendish died in 1794, Lord John Cavendish in 1795, and Lord Frederick Cavendish in 1803, all of them without issue: that Lord John Cavendish made a will, by which he devised, among other things, all his estates in the counties of York, Northampton, and Lancaster to such uses as Lord Frederick should appoint, and in default of appointment to Lord Frederick for life, with remainder to Lord George Henry Cavendish in fee: and that upon the death of Lord F. Cavendish in 1803, the ultimate remainder to Sir William Lowther's right heirs took effect, but Lord George Henry Cavendish entered into, and had remained in possession of the estates under the will of Lord John Cavendish. After deducing the pedigree of the plaintiff as heiress of Sir William Lowther, and stating that as the term of 200 years, though the trusts of it were satisfied, was still subsisting, she could not assert her claim at law, the bill contained the following allegation: "And the said Lord George Henry Cavendish

pretends that some recovery was suffered by the said Lord John Cavendish as tenant in tail in remainder under the will of the said testator, Sir William Lowther, and that some deed was executed to lead or to declare the uses of the said recovery, and that the said Lord John Cavendish, by virtue of the said recovery, and of the deed leading the uses thereof, became entitled unto the said estates as tenant in fee-simple in remainder, and that under or by virtue of the aforesaid will of the said Lord John Cavendish the said defendant, Lord George Henry Cavendish, became absolutely entitled to the said estates as tenant in fee-simple, the contrary whereof the plaintiff charges to be true, and that no good or valid recovery was ever suffered of the said estates, and if it were, that the estates were so settled that, in the events which have happened, the plaintiff, as the right heir of the said Sir William Lowther, is entitled thereto, and it would so appear if the said Lord George Henry Cavendish would set forth when and in what courts or court such recoveries or recovery of the said estates respectively were suffered, and who were the parties thereto respectively, and by whom the deeds creating the tenants or tenant to the præcipe were respectively executed, and who were the parties to the deeds or deed leading or declaring the uses of such recoveries or recovery respectively, and would produce all such deeds; all of which the plaintiff charges, if they exist at all, are now in possession of the said defendant, Lord George Henry Cavendish." The prayer was, that Lord George Henry Cavendish might be decreed to deliver up possession of the lands, and to account for the rents and profits, and that the defendants might be restrained from setting up the outstanding term in bar to any proceeding which the plaintiff might take at law.

To this bill Lord George Henry Cavendish pleaded that Lord George Cavendish being so seised (as tenant for life) and in possession of the said premises, and the said Lord John Cavendish being so entitled thereto for an estate in tail male in remainder, "certain indentures of lease and release, bearing date respectively the 28th and 29th of January, 1766, were duly made and executed, that is to say, the indenture of lease bore date the 28th of January, 1766, and was made and executed by and between the said Lord George Cavendish and Lord John Cavendish of the one part, and William Shaw of the other part, and the said indenture of release bore date the 29th of January, 1766, and was made and executed by and between the said Lord George Cavendish and Lord John Cavendish of the first part, William Shaw of the second part, and John Heaton of the third part, whereby Lord George Cavendish and Lord John Cavendish did grant, bargain, sell, and release unto William Shaw, all and every the manors, messuages, farms, lands, tene-

ments, rents, and other hereditaments whatsoever of the said Sir William Lowther, or whereof or wherein he or any person or persons, in trust for him or to his use, had any estate of freehold or inheritance in possession, reversion, remainder, or expectancy, &c., situate in the county of Lancaster, with their appurtenances, to hold the same unto the said William Shaw and his assigns for the joint lives of the said Lord George Cavendish and William Shaw, to the intent that the said William Shaw might be tenant of the freehold of the said premises, in order that one or more common recovery or recoveries might be suffered thereof, &c.: and it was thereby declared that the said common recovery or recoveries should inure to the intent and purpose to corroborate and confirm the term of 200 years limited by the said will of Sir William Lowther, and, after the determination thereof, to corroborate, strengthen and confirm the estate which by the said will stood limited to the said Lord George Cavendish for his life, with remainder to corroborate the estate limited by the will to trustees to preserve contingent remainders; with remainder to corroborate the estates limited by the said will to the first and other sons of Lord George Cavendish successively in tail male; with remainder to corroborate the estate limited by the said will to the said Lord Frederick Cavendish and his assigns for his life; with remainder to corroborate the estate limited by the said will to trustees to preserve contingent remainders; with remainder to corroborate the estates limited by the said will to the first and other sons of Lord Frederick Cavendish successively in tail male; with remainder to the use of Lord John Cavendish and the heirs male of his body; with remainder to the use of the survivor of Lord George Cavendish, Lord Frederick Cavendish, and Lord John Cavendish, his heirs and assigns, for ever: that at the Lancaster session of assizes, holden on Saturday, the 29th day of March, in the sixth year of George the Third, a common recovery was accordingly duly had and suffered of the said premises, in the Duchy Court of Lancaster, to the several uses declared in and by the said indenture of release hereinbefore set forth, in which recovery the said John Heaton was demandant, the said William Shaw tenant, and the said Lord John Cavendish vouchee, who duly vouched over the common vouchee: that Lord Frederick Cavendish survived Lord George Augustus Cavendish and Lord John Cavendish, and thereupon, under and by virtue of the said indentures of lease and release, and the recovery suffered in pursuance thereof as aforesaid, became and was seised of the said premises to him and his heirs for an estate of inheritance in fee-simple, and so continued until the time of his death: that the said Lord Frederick Cavendish departed this life in the year 1803, and that thereupon this defendant, under and by virtue of a title duly derived from the said

Lord Frederick Cavendish, entered into possession of the said premises, or into the receipt of the rents and profits thereof."

Mr. *Horne* and Mr. *Monro*, for the plea.

Mr. *Sugden* and Mr. *Pemberton*, for the bill.

The bill alleges that no valid recovery was suffered, or if any recovery were suffered, that the estate was so settled that, in the events which have happened, the title is in the plaintiff, and that so it would appear, if the plaintiff would produce all such deeds as are therein mentioned. These charges ought to have been met by an answer. How can a plea of a recovery be a complete answer to a case which proceeds upon matter *dehors* the recovery? Every averment in the plea may be true, and yet the estate may have been so settled as to vest the title in the plaintiff.

Mr. *Horne*, in reply.

The VICE-CHANCELLOR stated that the only question was whether the present case came within the rule that, where there are collateral allegations in the bill sufficient to avoid the effect of the matter relied upon as a defence by way of plea, those allegations must be denied by answer, in order to make the plea an effectual defence; that here the charge in the bill was that, if any recovery were suffered, the estate was so settled that the plaintiff was entitled as the right heir of Sir William Lowther; that the plea was a direct denial of that averment, for it set forth the uses of the recovery, and under those uses there could be no such title as was alleged in the bill, and that it was, therefore, evident that the matter charged in the bill, to which the plaintiff argued an answer should have been given, was not collateral to the matter pleaded.

For these reasons his Honor allowed the plea.

POPE v. BISH.

IN THE EXCHEQUER. JUNE 27, 1792.

[*Reported in* 1 *Anstruther*, 59.]

THIS bill was for an account, setting forth an award, and charging that it was obtained corruptly, and specifying the corrupt transaction. The defendant pleaded the award, denying corruption and all the particular instances especially by way of averment; and also put in an answer to the same points as the special averments in the plea.

An objection was taken by the Lord Chief Baron[1] that the answer overruled the plea.

Burton and *Johnson*, in support of the plea. It is necessary that the plea should be a complete bar, and also that it should be supported by an answer denying the special charge of corruption; but if these averments in the plea are not necessary, they are to be rejected as surplusage. The award is the material part of the plea: that is not in the answer; the averments in the plea and the answer are both only to support that plea, and, if not necessary, at least cannot overrule one another; but we insist they are both necessary. *Vide* the cases cited in Mitford, 216, note (*f*); 2 Atk. 396, 501.

By THE COURT. The meaning of a plea is to let the party stand upon a single point which bars the whole demand without going into an answer as to the rest of the bill; but this intent would be totally defeated if the plea were allowed to contain averments denying the whole charges of the bill tending to impeach the award.

The court gave leave to amend the plea by striking out the special averments, and let the remainder stand with the answer.

[1] Eyre.—ED.

EDMUNDSON v. HARTLEY.

In the Exchequer. December 13, 1792.

[*Reported in* 1 *Anstruther*, 97.]

Bill to set aside an award, and open transactions, stating many circumstances of improper conduct in the arbitrators: that they had named a day for hearing the parties; the defendant did not attend; the plaintiff attended with witnesses, one only of whom was heard, the arbitrators saying they did not require any more, and that if they should hear the defendant's case before making an award, they would give the plaintiff notice to attend; but that they afterwards appointed another day, and gave the plaintiff so short notice that he could not attend by reason of the distance, whereupon they collusively awarded against him. The defendant pleaded the award and denied collusion, averred that the defendant had sufficient notice to attend at the making the award, and that it was fair and equitable. To this plea there was joined an answer, denying specifically all the charges of malpractice in the arbitrators, and stating the same things contained in the averments of the plea.

Johnson, for the plaintiff.[1] . . . The plea is informal in this respect, that it is a plea "to the relief sought upon all matters referred to the arbitrators," whereas it ought to state what part of the bill in particular it is meant to bar.

It is also overruled by the answer, for this very point was lately determined in the case of Pope *v.* Bish, which was exactly the same as the present, and there the court held that it must be a naked plea of award, and that any averments in it are overruled if repeated in the answer, and are not to be considered as surplusage.

Burton and *Romilly*, in support of the plea, cited 8 Atkyns, 529, 3 P. Williams, 315, from which Mitford (page 209) draws the general conclusion that this is the proper mode of pleading.

So in the case of Butcher *v.* Cole, at the Rolls, before Lord Kenyon, 26th June, 1786, where, to a bill to set aside an award on the ground

[1] The part omitted has no reference to the subject of discovery. — Ed.

of collusion and want of notice to the plaintiff to attend at the making of the award, the plea stated the arbitration, and that the plaintiff had full notice, that an agent from him attended, and there was a full discussion before the award was made. There was also an answer containing similar averments of the fairness of the transactions. His Honor held the plea good, for an award pleaded nakedly would be *exceptio ejusdem rei cujus petitur dissolutio*, and is no full bar to the demand without denial of collusion and partiality.

These averments therefore are necessary, and if any of them should not be thought necessary, is at most only surplusage, which will not vitiate.

The court considered themselves bound by their own decision in the case of Pope *v.* Bish to hold that the award must be pleaded nakedly, but declared they did not mean to extend it beyond the case of awards, and thought that it would be too much to overrule the plea on this objection, and therefore, as in the case of Pope *v.* Bish, gave leave to amend if the plaintiff should insist upon it; otherwise to be good by consent.[1]

[1] Lord Redesdale, referring to the two preceding cases, says: "In the cases in the Court of Exchequer it seems to have been supposed that the answer in support of the plea overruled the plea. But an answer can only overrule a plea where it applies to matter which the defendant by his plea declines to answer; demanding the judgment of the court, whether by reason of the matter stated in the plea he ought to be compelled to answer so much of the bill." Tr. Pl. (5th ed.), 281, note (b). — Ed.

BAYLEY *v.* ADAMS.

BEFORE LORD ELDON, C. JANUARY 19, 1802.

[*Reported in* 6 *Vesey*, 586.]

THE bill, which was filed by the executors of Joseph Winder on the 20th of February, 1801, stated that the defendant, from June, 1771, till November, 1775, employed Winder as his stock-broker, and also as his agent or banker in London, during which time the defendant transmitted navy bills to be sold; for the produce of which as well as other remittances the defendant drew upon Winder from time to time, or otherwise such produce was paid by Winder to him when he came to London. On the 3d of October, 1771, an account was settled, upon which a balance of £899 16*s.* 4*d.* was due to the defendant. On the 17th of January, 1772, they settled another account, which was signed by the defendant, upon which a balance of £90 was due to the defendant. From that time, though Winder sent accounts from time to time, no further account was settled between them until the 17th of August, 1773, on which day another account was settled, upon which the balance due to the defendant was £163 18*s.* 11*d.*

The bill further stated that though the last account was not signed by the defendant, it was admitted to be correct in various letters written by him and by Anthony Adams, his nephew, by his directions, particularly by a letter dated the 27th of November, 1775, wherein the nephew desired Winder to send down his account from the 17th of August, 1773, to that time, and his uncle would make remittances. Winder accordingly sent the defendant an account up to the 13th of November, 1775, by which a balance of £1002 9*s.* 1*d.* appeared due to Winder.

The bill then stated that, after the aforesaid account had been so delivered to the defendant, Winder made repeated applications for payment of the balance by letters and otherwise; and the letters which he wrote to the defendant from the end of November, 1775, are now in the defendant's possession or power; but the defendant, though he at times admitted that the last-mentioned account was correct, and

that the balance of £1002 9*s.* 1*d.* was due from him to Winder, yet under various pretences evaded the payment thereof; and he and Benjamin Adams, his son, by his advice, wrote several letters to Winder, in which they made the aforesaid admission, and fixed several different times for the defendant's coming to London and settling the said account, and paying the balance; and the defendant was in London in September, 1790, and he then, under pretences that there was some difference between his account and Winder's, or some other pretences, prevailed on Winder to entrust him with the vouchers for the payments, amounting to £14,313 13*s.* 7*d.*, to examine, and he gave Winder a receipt for them, dated the 25th of September, 1790, which is now in the plaintiff's possession. Winder afterwards made repeated attempts to have the account settled and the balance paid to him by the defendant, but he was not able to accomplish it; and particularly in his last illness, and a few days previous to his death, he caused the last-mentioned account to be transcribed, and struck the balance in his own hand, and it was his intention to have taken legal measures to enforce the payment, but he died before he had an opportunity, on the 23d of March, 1795.

The bill then stating that the plaintiffs had several times applied to the defendant to settle the account and pay the balance, and that he refuses, sometimes pretending that no such transactions had taken place, at other times, that he had paid the balance to Winder, charged the contrary; and that though the defendant frequently promised to pay the aforesaid balance of £1002 9*s.* 1*d.*, yet he never did in fact pay any part thereof to Winder in his life, but that the whole (with the exception of an error to the amount of £1 7*s.* 8*d.*, charged to the defendant twice) was due to Winder at his death. The bill further stated that the defendant will at times admit that, but then pretends that the plaintiffs are barred by the Statute of Limitations from recovering any part of the aforesaid balance from him; whereas the plaintiffs charge the contrary, and that after the death of Winder the plaintiffs applied to John Adams, the son of the defendant, who resides in London, for a settlement of the aforesaid account; and the said John Adams, who acted in that behalf as the agent of the said defendant, informed the plaintiffs that the said defendant was equally desirous with the plaintiffs to have the account settled, but that the vouchers relating to it, and which had been delivered to the said defendant by Winder, had been lost, and he desired to have a copy of the account, as made out and balanced by Winder, delivered to him, and he promised it should be examined and settled; and the plaintiffs further charge that they did cause a copy of the said account to be made out and delivered to him, and he agreed to refer the said account to arbi-

tration, but afterwards receded from such agreement, and refused to do so.

The bill then stating other pretences of errors, particularly an error of £1000 in the account settled and signed by the defendant on the 17th of January, 1772, Winder not having given credit for the sum produced by the sale of a navy bill for £1000, charged the contrary, and that the accounts were correct in every item; that the defendant was in London when the said navy bill was sold, and the produce thereof was paid to him by Winder, and in support of that charging that it appears from the account settled on the 17th of January, 1772, and the fact is, that Winder received from the defendant on the 8th of January, 1772, the day on which the said navy bill was sold, £81 3*s.*, for which, as well as a smaller sum received from him on the day the account was settled, Winder gave the defendant credit in the account, and therefore the defendant would have discovered the omission of £1000, and would not have signed that account, or settled and allowed the account of the 13th of August, 1773, in which the sum of £1 7*s.* 8*d.* is again by mistake charged for commission on sale of the same navy bill, had not the produce thereof been previously paid to him; and the plaintiffs further charge that the defendant never applied to Winder or made any demand for the produce of the said navy bill; and that the defendant has made some entry in some of his books of account or memorandums of the receipt of the produce of the said navy bill, amounting to £980 or thereabouts, and such books, &c., are now in his custody or power, but he refuses to produce the same; and he has also in his custody or power all the vouchers relating to the payment of the aforesaid £14,318 13*s.* 7*d.* which were delivered to him by Winder.

The bill prayed an account of all the aforesaid dealings, &c., and payment of what shall appear due, and that the said vouchers may be delivered up.

The defendant put in a plea and answer. As to so much of the bill as states, alleges, or charges any accounts, dealings, or transactions to have subsisted, passed, or taken place between the defendant and Winder, and seeks to have any answer or discovery from the defendant touching all or any such accounts, &c., and as to the whole of the relief sought or prayed by the bill, the defendant pleads the Statute of Limitations; and the defendant avers that the causes of action or suit against the defendant in the said bill stated, alleged, or mentioned, or any of such causes, did not arise or accrue at any time within six years next before the day of filing the said bill.

And the defendant not waiving his said plea, &c., for answer to the residue of the said bill, &c., saith he hath been informed, and believes it to be true, that his son John Adams, in the bill named, who resides

in London, and hath for some time occasionally acted as the defendant's agent in London, was applied to by the complainants after the death of Winder for some such purpose as in the bill mentioned; but this defendant doth not know, nor hath been informed, save by the bill, nor doth believe, that the said John Adams on that or any occasion informed the complainants or any of them that this defendant was desirous to have the account in the bill mentioned settled, or that the vouchers relating thereto, and which are in the bill alleged to have been delivered to the defendant by the said Joseph Winder, had been lost, or to that or any such effect; nor doth the defendant know, nor hath been informed, save by the bill, nor doth he believe, that the said John Adams on being so applied to or on any occasion promised that the account in the bill mentioned should be examined and settled, or to that or any such effect.

Saith he doth not know, nor hath been informed, save by the bill, nor doth believe, that the said John Adams at any time or upon any occasion agreed with the complainants to refer the accounts in the bill mentioned to arbitration.

Saith that he never directed, empowered, or authorized the said John Adams to make any such promise or request as in the bill mentioned to the complainants, or to refer or agree to refer the accounts in the bill mentioned to arbitration; and the defendant denies all unlawful combination and confederacy in and by the said bill charged.

Mr. *Romilly* and Mr. *Johnson*, in support of the plea. The object of this bill is an account of transactions which ended twenty-six years before the bill was filed, which was only a month within the six years. The principal objection will be that the facts stated in the answer ought also to be inserted by way of averment in the plea. But why should they be repeated? In Pope *v.* Bish[1] and Edmundson *v.* Hartley[2] it was on that ground held that the answer overruled the plea. The first consideration is whether the bill contains any allegation of fact that takes the case out of the statute. Upon the bill there is no promise by the defendant or any person authorized for that purpose by him; the allegation is only that the son of the defendant, acting without his authority as his agent, made the promise. The bill does not state that he had authority, or that he had acted upon any other occasion as agent of the defendant. As there is no allegation of that nature, no averment upon that subject is necessary in the plea.

If, however, that statement in the bill is considered as taking the case out of the statute, then upon the authority of the cases in the Exchequer the denial by the answer is sufficient without also a denial by way of averment in the plea. The case[3] referred to in the passage

[1] 1 Anstr. 59. [2] 1 Anstr. 97. [3] 3 Atk. 70.

in Mitford[1] against this does not contain any decision of the point for which it is referred to. Since that case the general form of pleading this statute has been that the cause of action hath not accrued within six years; and that is correct, for it follows the statute. There are certainly *dicta* in support of the general proposition stated by Mitford, that there must be denials by averment in the plea and also by an answer: but there is no authority for that; and it is inconsistent with the office of a plea to reduce the cause to a single point. Instead of shortening the cause, a plea would have the effect of creating a necessity for double averments by the plea and the answer. The case in which it is necessary to have averments by the plea also is where those facts make part of the equitable bar; as in the case of a purchase for valuable consideration notice must be denied, for the purchase without that is not a bar. But there is nothing in this bill calling for any averment beyond the general one introducing the plea of the statute. No special promise is alleged. As to Edmundson *v.* Hartley, many cases in which the party has been permitted to plead the thing which the bill seeks to set aside are stated by Mitford,[2] as an award, a release, &c.; but there is no authority for the position that the circumstances must be denied both by plea and answer.

Mr. *Alexander* and Mr. *Pemberton*, for the plaintiff. The reason of the rule upon which the first objection rests is, that the plea should constitute a complete bar to the suit. Therefore the plea must by averment answer the charges which, if true, would avoid the plea. That is the reason stated in Mitford. If the plaintiff takes issue upon the plea, and it does not contain a complete answer to the bill, the plea may be proved, and yet the case stated by the bill may entitle the plaintiff to succeed. The reason upon which a denial by answer is also necessary is, that the averments of the plea need not follow the charge particularly. That must therefore be done by answer, in order that the plaintiff may have an opportunity of excepting. It is assumed that the son acted as agent of his own authority; but it must be intended that he acted as an agent properly constituted. The allegation is sufficient to call for an answer; and therefore according to the rules of pleading it is sufficient to call for averments by the plea. Another objection is, that there never was a plea of this kind without a denial of a promise within the six years, as at law, *non assumpsit infra sex annos*, as well as that the cause of action accrued within six years. All pleas of this sort also contain an averment not only that there was no promise or cause of action within six years before the bill filed, but also before any process issued; and though the act of Parliament[3] certainly requires the bill to be filed before process issues, the constant

[1] Mitf. 212, 213. [2] Mitf. 209. [3] Stat. 8 & 4 Ann. c. 16.

practice is otherwise, and the irregularity is cured by appearance. Some charges of this bill are not noticed either by the plea or the answer: one allegation which by fair construction may be supposed to include promises to Winder; that he made repeated applications for payment of the balance. It was necessary to aver by this plea that the defendant had made no such promise as is stated, and that his son was not authorized to settle the business. Davie v. Chester [1] and Hoare v. Parker [2] are express authorities in support of the position in Mitford. The object of a plea is to bring a single point in issue; and upon this plea these facts would not be in issue. The plea is also bad, as being both to discovery and relief. The Statute of Limitations clearly cannot be pleaded to the discovery of the time when the cause of action accrued.

Mr. *Romilly*, in reply. As to the discovery wanted, they may except to the answer. The constant practice is to plead the statute to a bill for discovery merely. The last plea of this sort [3] was both to discovery and relief, and no such objection was taken.

The great objection is as to the necessity of averments in the plea. There is no judicial authority that distinctly proves that, except Davie v. Chester. In the case in Atkyns [4] the objection was that the defendant had not answered the circumstances, not that he had not answered them by the plea, for which point it is referred to in Mitford.[5] The same book refers to Lingood v. Croucher [6] and Lingood v. Eade.[7] Hoare v. Parker does not in the least apply. The plea was as to particular pieces of plate; but there was no general averment that the defendant had not any other plate deposited with him, though by his answer he denied that he had any other. Consequently the plea was not alone an answer to the bill; and the plaintiff was under the necessity of replying to both the plea and the answer. According to this argument issue must be taken upon a great number of points instead of one. Certainly a plea must be a complete answer to the bill; and therefore a plea of purchase for valuable consideration must aver that it was without notice: so the plea of an award to a bill to set it aside for fraud must deny fraud: but the question is whether it must deny all the circumstances from which the plaintiff infers fraud. That is a

[1] Mitf. 217. [March 10, 1780. A decree establishing a modus having been pleaded to a bill for tithes, in which the plaintiff stated that the defendants set up the decree as a bar to his claim, and to avoid the effect of the decree, charged that it had been obtained by collusion, and stated facts tending to show collusion, the Chancellor [Lord Thurlow] was of opinion that the defendants not having by averments in the plea denied the collusion, although they had done so by answer in support of the plea, the plea was bad in form, and he overruled it accordingly. — Ed.]

[2] Mitf. 217; 1 Bro. C. C. 578. [3] Jones v. Pengree, 6 Ves. 580.

[4] 3 Atk. 70. [5] Mitf. 213. [6] 2 Atk. 395. [7] 2 Atk. 501.

very different question. The plea of *non assumpsit infra sex annos* at law must in substance be the same as that the cause of action did not accrue within six years; otherwise, unless a cause of action arose upon the promise, it would not be a case within the statute. The allegation of this bill as to the promise is not of a promise within six years. It is only necessary to meet allegations that would take the case out of the statute, not those that might by possibility have that effect. What principle can there be for the distinction taken by the Court of Exchequer upon a plea of an award? All these pleas of awards, releases, &c., have been put upon the same ground. The objection to the allegation of the son's agency is, that the statement that he acted as agent is not stating that he was agent. If this plea is wrong the defendant will have leave to amend.

Lord Chancellor. With regard to the merits, I should feel a strong inclination to let you amend this plea; for upon the statement of the plaintiff nothing more is really in dispute than whether credit was given in an account produced a great many years ago for the produce of a navy bill. The question whether the amendment is necessary has introduced a great variety of very important considerations. If the result of the opinion stated in Mitford is accurate, it is very difficult to reconcile the two cases in the Court of Exchequer with that result from the former cases. Those two cases in the Exchequer seem to import that this is the rule of pleading in equity, that if a bill is brought to set aside an award upon grounds admitting the award made, but seeking to cut down the effect of it by alleging grounds of partiality and corruption, the defendant may plead the thing the dissolution of which is sought by the bill, putting it in this form, that the plea shall merely aver the existence of it and contain no allegation in the body of the plea as to the circumstances upon which the award is impeached, but the defendant may express what his conscience suggests as to those circumstances, not in the body of the plea, but in an answer. The first difficulty upon that is how to consider that record filed by the defendant, consisting partly of what is called plea, partly of what is called answer, as in a correct sense either a plea or an answer. The office of a plea in bar at law is to confess the right to sue, avoiding that by matter *dehors*, and giving the plaintiff an acknowledgment of his right, independent of the matter alleged by the plea. The plea alleges some short point, upon which, if issue is joined, there is an end of the dispute. In this court, in general cases not classed among those where certain averments seem to have been required both by the plea and the answer, but where the defendant *pro hac vice* for the sake of the argument admits the whole bill, I have understood the rule to be the same here as at law, that the

plea admitting the bill interposes matter which, if true, destroys it, and upon the truth of which the plaintiff is at liberty to take issue. Cases have arisen in which it has been thought necessary both to plead and to repeat the assertions of the plea in an answer; that is, as it is technically expressed, the plea is supported by an answer. Those cases are very various, and I own I should have entertained an idea, before I heard of those cases in the Court of Exchequer, that, if a bill was filed to set aside an award upon special circumstances, the first difficulty would be upon the maxim referred to by the report: "*Exceptio ejusdem rei, cujus petitur dissolutio.*"

But it is true that not only upon awards, but releases, judgments, &c., the court had admitted a plea called a plea, though in its nature very different from the character of a plea in general cases; for it is not strictly speaking admitting the fact stated, and by the effect of new matter introduced by the defendant getting rid of it, but admitting one fact in the bill, and either by plea or by answer, or by both, setting up again that which the bill seeks to impeach, by denying either in the plea or the answer, or both, all the circumstances which the plaintiff admits, if truly denied, are sufficient to bar the relief. The cases in the Exchequer are confined to the plain case of an award, in which case, it is said, you are at liberty to plead the award; in that sense alleging something that meets the effect of the bill by the plea. But can that be said if you only admit the existence of the instrument stated by the bill, which by the effect of the other circumstances stated by the bill is impeached? If this were *res integra*, I should have thought it more difficult to say the defendant was bound to set out all the circumstances by averment in the plea, and could fortify it by an answer denying those circumstances. Such a record is neither plea nor answer, but something like a mixture of both, and very inaccurate. That this was the general idea is evident from the book that has been referred to, which is the production of a very diligent and learned man, not once given to the world, or hastily, but after search and research into every record, and again given to the world by him. There is hardly one point of equitable proceedings with regard to pleas with which it is not exceedingly difficult to reconcile those two cases in the Exchequer; for instance, what is said in Mitford[1] as to a bill brought to impeach a decree on the ground of fraud used in obtaining it, that "the decree may be pleaded in bar of the suit, with averments" (in the plea it appears by the context) "negativing the charges of fraud, supported by an answer fully denying them." So of a judgment:[2] "If there is any charge of fraud or other circumstance shown as a ground for relief, the judgment or sentence cannot be

[1] Mitf. 197. [2] Mitf. 205.

pleaded unless the fraud or other circumstance, the ground upon which the judgment or sentence is sought to be impeached, be denied, and thus put in issue by the plea, and the plea supported by a full answer to the charge in the bill."

In the case of a stated account also,[1] "if error or fraud are charged, they must be denied by the plea as well as by way of answer." So with regard to an award,[2] which is the subject these cases in the Exchequer more particularly allude to, "if fraud or partiality is charged against the arbitrators, those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer showing the arbitrators to have been incorrupt and impartial." Upon the Statute of Limitations,[3] "where a particular special promise is charged to avoid the operation of the statute, the defendant must deny the promise charged by averment in the plea, as well as by answer to support the plea." So as to a purchase for valuable consideration,[4] "the special and particular denial of notice or fraud must be by way of answer, that the plaintiff may be at liberty to except to its sufficiency. But notice and fraud must also be denied generally by way of averment in the plea; otherwise the fact of notice or of fraud will not be in issue."

This is laid down here distinctly, and in many other books; for I have lately looked into the point for another purpose, and I think I may say, whatever doubt may be expressed as to the necessity of denying by plea and answer, that there is no countenance for that upon the old authorities. Sir John Mitford's idea is that if you are to call this defence a plea, it must be such that issue may be taken upon it as a plea; and if it is substantiated by evidence as a plea, there is an end of the cause. Where the defendant, not stating merely matter *dehors*, but admitting part of the charge, gets rid of it by circumstances, I do not know that it might not be called a plea and answer; but that is a record of a character very distinct from that which is usually called a plea.

With respect to the first of the cases in the Court of Exchequer, I wish to know what was the event of it, after leave was given to strike out the averments. If the plea had no part of that which was contained in the answer, how could the plaintiff proceed upon that so amended as a plea? It admits the award, the very fact stated in the bill. Must it not be complete as a plea, and contain in itself all the allegations which, being proved, are necessary to authorize a judgment for the defendant? To the record so purged the character of a plea, technically speaking, does not belong; neither can it technically be called an

[1] Mitf. 208.
[2] Mitf. 209.
[3] Mitf. 212.
[4] Mitf. 216.

answer; but it is something called a plea and answer, being in substance the same as if the defendant had answered. It is impossible not to feel the authority belonging to these cases. The point was decided upon reconsideration in the second case, and therefore the question, if this record necessarily furnished it, would make it proper to consider whether the principles upon which I have argued are right or wrong, and whether the conclusion drawn in Mitford, not only as to one point, but upon every point which analogy brings within the reach of argument, has been ill collected. In supporting this plea the counsel have felt the difficulty of contending that there must not be averments both by the plea and by answer.

As to amending the plea, if the averments in the plea were the same as the answer, and if the defendant cannot say a great deal more, I much doubt whether the averments in the bill are sufficiently denied. The allegations of applications to settle are certainly put very loosely in the bill; but I would take it to be a bill distinctly stating in effect that the cause of action was gone much more than six years. The allegation as to the authority of the son I understand to mean this, in legal construction, that he acted at the time of the application as agent in the article of the settlement of accounts; and if so, it cannot be doubted that the defendant authorizing him within six years to act as his agent for the settlement of the accounts, would amount to a new assumpsit, and take it out of the statute. This therefore is a very material charge. Observe how the defendant answers. He does not state what sort of agent his son was. As I conceive, he was bound to state whether he was the agent in the article of the settlement of accounts. There is no distinct answer to that. The concluding statement that he never authorized John Adams to make any such promise or request, or to agree to refer the accounts to arbitration, may be answering honestly, as he conceives the fact: but it may be false both in law and fact; for if he had admitted that the other was agent for the settlement of accounts, what was the power of an agent so constituted is the construction of law upon the fact, and that mere appointment, if distinctly admitted, would take it out of the statute, importing that there were accounts to settle; and the direction and power which the defendant supposes himself not to have given, would be implied in law in that character. I have a strong doubt, therefore, whether the plea, if to be amended, must not be amended in substance, beyond merely throwing into it the allegations of the answer. But in such a case I would not preclude the defendant from amending as to the averments in the plea, if any averments are necessary. The objection goes to this, that the plea would be good almost without averments in the plea or the answer; for if the plea is that the cause of

action did not arise within six years, and if a new assumpsit should be proved, then it does not contain that upon which the party must go to issue effectually, and, proving his case, would be entitled to dismiss the bill. But that will not do; for this is a bill stating that the cause of action arose a great while beyond six years; admitting that, if that was all, the statute would be an answer; but it states also that the reply to that is, that within six years a new transaction has taken place, which forms a new assumpsit, upon which the plaintiffs say they are entitled to the relief. It would be quite anomalous to go to issue upon a plea, the issue upon which must be quite unnecessary unless other circumstances are brought forward, or to proceed in the suit without knowing by plea or by answer whether the circumstance to take the case out of the operation of the statute has or has not existence.

The case, therefore, must not be reduced to a decision upon the point whether the averments must be both in the plea and the answer, as I think, if the averments were in both, they are not sufficiently averred Upon that point I will not say more than that it seems difficult to sup port the two cases in the Exchequer. If the defendant chooses to amend the plea, or both the plea and the answer, I will not object to it; but he must answer much more fully before I shall consider it sufficient.

The plea was ordered to stand for an answer, with liberty to except, except as to setting forth the accounts.

CORK v. WILCOCK.

BEFORE SIR JOHN LEACH, V. C. JUNE 27, 1821.

[*Reported in* 5 *Maddock*, 328.]

ON the 21st March, 1814, the defendant gave his promissory note to the plaintiff for £700 with interest. The note was not paid, and the plaintiff, in 1820, brought an action upon it. The defendant pleaded the Statute of Limitations, and the plea was replied to, and issue joined.

The plaintiff by his bill, stating the foregoing facts, further stated that he was unable to proceed with safety to the trial of the action, as the defendant pretends he did not within six years next before the commencement of the action promise to pay, and the plaintiff is not in possession of admissible evidence to prove such promise. The bill then charged that the defendant did on several occasions subsequently to the 7th June, 1814, and before the commencement of the action, verbally promise and undertake to pay the plaintiff the amount of the note, and admitted that the principal sum was unpaid, and also admitted to divers persons that the money was owing. A further charge was, that on the 4th of July, 1815, the wife of the defendant, as his agent and with his privity, paid to the wife of the plaintiff, as his agent, the sum of £35 for one year's interest on the note up to the 21st March, 1815; and that on the 3d June, 1816, the defendant, or his wife, as his agent and with his privity, paid to the plaintiff the further sum of £35 for one year's interest upon the said note up to the 21st March, 1816, and that on that occasion the plaintiff repaid to the defendant, or permitted him to deduct from the said sum of £35, the sum of £3 10*s*., being the amount of one year's property tax upon the said payment. The bill further charged similar payments for interest up to the 21st March, 1817, and to the 21st March, 1818, and that the plaintiff, at the request of defendant, or his wife, indorsed upon the note receipts or acknowledgments in writing for each of the payments as they were made. The bill then charged that the defendant had been in the habit of keeping written accounts of his pecuniary deal-

ings and transactions, and that he has or had books of account, written accounts, papers, or writings, in which he or some person or persons, as his agent or agents, hath or have made some entries or entry, memorandums or minutes, relating to the said sum of £700, and to the several payments of interest so made on account as before stated, or relating to some or one of these particulars; and that the defendant is or was in possession of some documents, papers, or writings relating to the whole or part of the matters before stated, or to some of them, by which the truth would appear; and that the wife of the defendant informed him of the several payments made as aforesaid, and that he never made any objection or ever alleged or pretended that the money was not due; and that the plaintiff is unable to proceed to the trial without a discovery from the defendant. The bill prayed a discovery and the benefit thereof, and that he might be allowed to give the same in evidence on the trial of the action.

The defendant pleaded to part of the bill, and answered part. The plea, which was very long, stated in substance that as to so much of the bill as related to the alleged sum of £700 due, and the alleged payments of interest, and except as to so much of the bill whereby the defendant is required to discover and set forth a list or schedule of books, &c., and except as to so much of the bill as sought a discovery whether the wife of the defendant did not inform him of the several payments in the bill mentioned, and whether he made any objection as to those payments, or alleged they were not due, the defendant pleaded the Statute of Limitations, and averred that if the plaintiff ever had any cause of action, the same accrued above six years before the filing of the bill, and above six years before the commencement of the action; and then the plea, by averment, denied the several facts stated in the bill, and which were also denied by the answer accompanying the plea.

Mr. *Wray*, in support of the plea; Mr. *Bell*, contra.

When the case was opened the Vice-Chancellor objected to the form of the plea, as containing unnecessary averments. It was urged, however, that the plea was good according to the inclination of the Lord Chancellor's opinion in Bayley *v.* Adams;[1] and Baillie *v.* Sibbald was also cited.[2]

The VICE-CHANCELLOR. Where the plaintiff in equity seeks to avoid a legal bar upon equitable grounds, there the defendant in equity, pleading the legal bar, must of necessity accompany his plea with averments generally denying the equitable matter; for otherwise there would be no fact to be tried upon his plea, because the bill admits the legal bar; and such a defendant must nevertheless accom-

[1] 6 Ves. 586. [2] 15 Ves. 185.

pany his plea with an answer to all the special circumstances charged as constituting the equitable ground, that the plaintiff in the trial of the general averments in the plea may not lose the benefit of the discovery from the defendant.

But this reason and rule as to averments have no application to the present case.

The object of the present bill is to obtain a discovery from the defendant to be used at law, in order to disprove the plea of the defendant there that he has made no promise within six years; and this discovery the defendant is bound to give. But he has a right to protect himself in equity by the Statute of Limitations from a discovery as to the original constitution of the debt, or whether it has since been paid. The proper course, therefore, is for the defendant to plead the statute to such last-mentioned matters, and then to answer fully the rest of the bill; and to introduce averments in the plea, to the effect of the answer, is a useless repetition of the same matter, and mere confusion as to the rule and use of averments.

I must overrule the plea, but I will permit you to put in another plea.

The cause was afterwards compromised.

LORD PORTARLINGTON *v.* SOULBY.

BEFORE SIR LANCELOT SHADWELL, V. C. NOVEMBER 8 AND DECEMBER 10, 1833.

[*Reported in* 6 *Simons*, 356.]

THIS was a bill by the acceptor against the indorsee of a bill of exchange to have the bill delivered up to be cancelled, on the ground that it had been given by the plaintiff to secure money lost at play to the drawer, who had indorsed it to the defendant without consideration, after it was due, and with notice of the circumstances under which it had been accepted.

The defendant pleaded to the whole bill that he was a *bona fide* purchaser of the bill of exchange for valuable consideration, without notice of the circumstances under which it had been accepted; and "for better supporting" the plea he put in an answer denying that the bill was indorsed to him after it had become due, or that he had notice of the circumstances under which it was alleged to have been accepted. But the answer did not notice the allegation in the bill that the defendant had in his custody books, papers, &c., from which the truth of the matters contained in the bill would appear; and on that account the Vice-Chancellor overruled the plea, holding that it was incumbent on the defendant to give all the discovery sought by the bill relating to the subject-matter of the plea.

His Honor, however, gave the defendant leave to plead *de novo*.

The defendant accordingly put in another plea and answer to the same effect as the former, and denying the allegation omitted to be noticed in the former answer.

Mr. *Knight* and Mr. *Sidebottom*, in support of the plea, said that a court of equity would not give its assistance against the holder of a security for valuable consideration, who denies notice of any of the circumstances affecting its validity.

Mr. *Pepys* and Mr. *Bagshawe*, in support of the bill. The plea is wrong in form. The defendant, instead of pleading to the whole bill, ought to have excepted from it so much as avoids the bar, and then

pleaded the bar and denied by answer the parts excepted. The answer overrules the plea.

Mr. *Sidebottom*, in reply, referred to Mitf. 199; Gilb. For. Rom. 57; Bayley *v.* Adams;[1] Edmundson *v.* Hartley.[2]

The VICE-CHANCELLOR. The plea is wrong in point of form. It ought to have been a plea to all the relief and to all the discovery sought by the bill, except certain parts, and to those parts there ought to have been an answer in support of the plea. You cannot plead and answer to the same matter.

Plea ordered to stand for an answer, with liberty to except.

[1] 6 Ves. 586. [2] 1 Anstr. 97.

FOLEY v. HILL.

BEFORE LORD COTTENHAM, C. JUNE 22, 23, 1838.

[*Reported in* 8 *Mylne & Craig*, 475.]

THE bill, which was filed in January, 1838, stated in substance that in the month of April, 1829, the defendants carried on business in co-partnership as bankers at Stourbridge, and that on the 11th of April in that year the plaintiff opened a banking account with them by causing a sum of £6117 10*s.* to be paid into their bank on his account, for which the defendants gave him their accountable receipt; that divers sums continued from time to time to be paid, and divers checks to be drawn by the plaintiff and his agents on such account, during the successive years 1831, 1832, 1833, and 1834, which sums and checks were duly entered and noted in the defendants' banking books, and to the plaintiff's account; that interest accrued on the balances from time to time due on such account, and was duly entered or credited to the plaintiff in the said account; and that during the whole of the aforesaid period a very large sum was due to the plaintiff on the balance of such account. It then alleged that the plaintiff, being desirous to close his account with the defendants, made applications to them to render a statement of their receipts and payments on his account, and of the interest accruing on the balance, but that they refused, under the pretence that no entries had been made to or on account of the plaintiff's account within six years then last past, and that no written acknowledgment of the existence of any such account, and no written promise to pay the balance thereof, had been signed by the defendants or any member of their firm since the accountable receipt of April, 1829, and that the claim was barred by the Statute of Limitations.

The bill then contained a variety of special charges, all tending to show that the defendants had, by their own acts, and by entries and statements made within the six years, and down to a very recent period, in their partnership books and accounts and balance sheets, treated and admitted the plaintiff's claim as a subsisting debt due from them to him. The bill further charged that various letters and written

communications had within the six years passed between the defendants and their solicitor and other persons relative to the matters mentioned in the bill, and wherein the existence of the plaintiff's claim as a subsisting debt was stated or admitted, and that in the banking books and balance sheets of the firm there were various entries and memoranda referring to or including the sum of £6117 10*s*., and the other moneys received on the plaintiff's account, or the balance due in respect of such account, and that by such entries and memoranda the truth of the matters therein stated and charged would appear. The bill also contained the usual charge as to the possession of books, accounts, papers, vouchers, &c., and called upon the defendants to set out in a schedule a true and correct list of them.

The bill prayed an account and payment of the balance due upon the plaintiff's banking account.

To this bill two of the defendants put in a joint and several plea and answer, whereby to all the discovery and relief sought by the bill — other than such parts of it as sought a discovery by means of the interrogatories founded on the allegations and charges introduced for the purpose of showing that the defendants had within six years admitted or treated the demand as a subsisting debt (which excepted parts were specifically set out) — the defendants pleaded the Statute of Limitations. They then went on, by answer, to deny *seriatim* a considerable portion of the special charges with respect to the alleged transactions as amongst themselves, and between themselves and other persons on behalf of the plaintiff, relative to his claims within the six years last past; but they did not fully answer the charges upon that point, and in particular they omitted to make any answer to the charges relating to entries in the partnership books and balance sheets, to admissions or statements in communications with other persons, and to the possession of books and papers touching the matters in question in the cause.

This plea was set down and came on for argument before the Vice-Chancellor[1] on the 5th of May, 1838, when his Honor, on the ground that the defendants had not fully answered such parts of the bill as were excepted from the plea, and as they purported to answer, made an order overruling the plea. The defendants now appealed against that order.

The *Solicitor-General*[2] and Mr. *Armstrong*, in support of the appeal. The alleged insufficiency in the defendants' answer consists principally in this, that they do not thereby deny that they have written letters within six years acknowledging the plaintiff's debt, or that they have in their custody or power documents, papers, and accounts relating to

[1] Sir Lancelot Shadwell. — Ed. [2] Sir Robert Monsey Rolfe. – Ed.

the matters in question, and by which the truth of the charges in the bill would appear. But what we contend is, that upon the argument of the plea (and here the case comes before the court simply upon the plea) the court has no right to look at all into the answer for the purpose of judging whether it is sufficient or not. Our plea is a perfectly good plea if it be true, but when a party has set down a plea to be argued, the sole question is, whether, assuming it to be true, it is a valid defence to the demand. In a plea two matters are to be considered: first, its validity as a defence, if true; and, secondly, its truth. The former is purely a question of law, the latter, of fact; and with a view to the trial of the latter, the plaintiff, by excepting to the answer, may obtain the further discovery which he requires.

The LORD CHANCELLOR. I understand your proposition to be that the plea would be good, although there was no answer to support it. Suppose a plea of purchase for valuable consideration without notice to a bill which charged particular acts equivalent to or inferring notice, would it not be necessary to deny those charges by the answer?

The *Solicitor-General.* The plaintiff is entitled to except to the answer, and so may get a full discovery. This answer I admit is open to exception. The Vice-Chancellor's judgment went upon the ground that there were particular charges in the bill which were excepted from the plea for the purpose of being answered, and were not pleaded to, and which, nevertheless, were not fully answered. But if his Honor's decision be correct, where is the line to be drawn? The only possible object of such an answer is to prove the truth or untruth of the plea. The bill states certain facts showing that the matter of the plea does not exist. As to those facts the plaintiff has a right to call for an answer; but such answer is not to be looked at for the purpose of seeing whether the plea is or is not a good plea in law, although it may conclusively establish that the plea is untrue in fact. No case exactly involves or decides this point. The question, however, is glanced at incidentally in an anonymous case in Atkyns,[1] a case referred to by Lord Redesdale,[2] in the passage of his Treatise on Pleading where his Lordship considers the subject. The conclusion at which his Lordship arrives,[3] however, is not reconcilable with principle, and seems at variance with the doctrine laid down by Lord Eldon in Bayley *v.* Adams.[4] The cases of Pope *v.* Bish[5] and Edmundson *v.* Hartley[6] cannot be law.

The LORD CHANCELLOR. If facts which, if true, would destroy the plea are left untouched by the answer, I certainly never have supposed they could be safely so left. What you neither plead to nor answer,

[1] 3 Atk. 70. [2] P. 271, 4th ed. [3] See pp. 256, 298.
[4] 6 Ves. 586. [5] 1 Anstr. 97. [6] 1 Anstr. 59.

you admit. So that what the court would be doing would be to say, here is a very good defence, and here, at the same time, is a fact admitted which destroys it as a defence.

The *Solicitor-General.* The principle seems to resolve itself into this, that what the plaintiff is entitled to he is entitled to in the shape of discovery to enable him to rebut the truth of the plea when that comes to be controverted; but that, as the truth of the plea cannot possibly come in question upon the argument as to its validity, the court, in this stage, has no right to inquire into the sufficiency of the discovery. This is the view which seems to have been taken by Mr. Wigram in his Points in the Law of Discovery;[1] Sanders *v.* King;[2] Thring *v.* Edgar;[3] Cork *v.* Wilcock;[4] M'Gregor *v.* East India Company;[5] Lord Portarlington *v.* Soulby.[6]

The Lord Chancellor. The bill in this case is founded upon the principle of anticipating a legal bar in the shape of a plea of the Statute of Limitations; and with that view it introduces, in the usual way, a charge which, if true, would remove the bar by preventing the operation of the statute. That is the neat statement of the point, and it certainly raises a question applicable not only to the Statute of Limitations, but to every case where a charge is to be found in a bill which, if true, would remove an expected legal bar. The defendants plead the legal bar. No objection is taken to the averments of the plea; but the objection is that the allegation which, if true, meets the bar, and is very properly excluded from the plea, is not answered. The answer does not in terms negative that allegation, and the argument is that, under these circumstances, the court must adjudicate upon the plea, and that the question whether that allegation be or be not true, although a material part of the case in order to try the truth of the plea, is not a material circumstance upon the argument of the plea; in other words, that the court would be bound to allow the plea, though there was no statement in the answer to destroy the effect of the allegation in the bill introduced for the purpose of meeting and displacing the anticipated bar.

Now, independently of authority, and having been occasionally engaged in cases of this sort for upwards of thirty years, I have always considered it to be one of the best established principles of pleading that this could not be done. I have always understood that where a bill contained an allegation which would meet the legal bar, the defendant could not plead the legal bar without negativing that allegation. That applies to all cases of this kind, — to pleas of the Statute of Limita-

[1] P. 185. [2] 6 Madd. 61. [3] 2 Sim. & Stu. 274.
[4] 5 Madd. 328. [5] 2 Sim. 452. [6] 6 Sim. 356.

tions, pleas of fraud, and so forth. Lord Redesdale lays down the rule very clearly. Lord Eldon not only lays it down, but rests his decision upon it in Bayley v. Adams;[1] for the result of that case was, as appears from the marginal note and his Lordship's judgment, that the charges in the bill were not sufficiently answered, and the question was whether under those circumstances the plea was or was not to be allowed.

It was argued that if the charge introduced for the purpose of meeting the plea has not been sufficiently answered, the proper course is to take exceptions to the answer. That, however, is not so. The plaintiff cannot except to the answer until after the argument on the validity of the plea, for by excepting to the answer he would admit the validity of the plea.[2] The reason of the rule is not very material, for we find it not only laid down by Lord Redesdale and Lord Eldon, but received as the universal rule in practice. The whole machinery of pleading in equity is somewhat cumbrous, and not quite well reduced to principle. At the same time we must recollect that the plaintiff, by the mode of pleading he has adopted, furnishes himself with a special replication in the bill if he anticipates the defence by introducing a charge which would meet it. If the defendant had pleaded the statute, the plaintiff, according to the old practice, would reply the matter here stated by way of charge. That would be a special replication, a course which is not now permitted; but the plaintiff does that which is equivalent to it by framing his bill in the manner he has adopted here. Now the defendant cannot plead to the whole of such a bill as that, for the legal bar is not the only question to be tried. There are two questions: first, whether the legal bar would apply; and, secondly, if it would, whether it is not defeated by the circumstances charged in the bill for the purpose of meeting it. Then the defendant puts in the plea, pleading his legal bar, and takes issue on that matter which is to deprive the legal bar of its effect. The court requires that he should meet that allegation in the bill which, if true, would show that the bar ought not to prevail; otherwise the court would be deciding upon the legal bar without the advantage of the defendant's oath as to whether there was not something in the case which would make that legal bar inoperative. The court, therefore, requires that the defendant should, at least to the extent of his oath, pledge himself to the denial of that which, if true, would defeat the legal bar. These defendants have pleaded the legal bar, but they have left quite untouched the charges introduced for the purpose of obviating that bar. It is a question which all authorities and the universal practice of the profession have determined, and I have no doubt, without hearing the counsel for the plaintiff, that the Vice-Chancellor's decision was right.

[1] 6 Ves. 586. [2] Redes. Pl. 317, 4th ed.

The LORD CHANCELLOR then said, in reply to an application by the Solicitor-General for leave to amend the answer, that he could not grant such leave, for it would be giving leave to put in a further answer, and would be, in effect, allowing the plea.

The *Solicitor-General* then asked leave to withdraw the plea and answer.

The LORD CHANCELLOR. I have always refused to permit a party to withdraw an answer. What is once on the record must always remain there. Where a mere slip has been made I am anxious to relieve the party if I can, but, at the same time, I must adhere to the rules of pleading. If you could effect your object by amending the plea, I might be disposed to permit you to do so, but I cannot do what you wish, for the reason I have stated.

HARRIS v. HARRIS.

BEFORE SIR JAMES WIGRAM, V. C. APRIL 30 AND MAY 1, 1844.

[*Reported in* 8 *Hare*, 450.]

THE bill stated, in June, 1834, Walter Harris, the late husband of the plaintiff, entered into partnership with the defendant, Thomas Harris, his father, in the business of a postmaster, &c.; and the bill also stated the alleged terms and conditions, and it stated several circumstances as evidence of the existence of such copartnership; the bill then stated the death of Walter Harris in 1843, leaving the plaintiff his widow and executrix. The bill charged, among other things, that the defendant had in his possession or power divers documents, by which the truth of the said matters would appear; and after the usual interrogatories to such charges, the bill prayed that the partnership accounts might be taken, and the share of Walter Harris ascertained and paid to the plaintiff, and that the defendant in the mean time might be restrained from getting in the partnership assets.

The defendant, in bar to so much of the bill as alleged that the late husband of the plaintiff and the defendant entered into partnership at the said time, and as called upon the defendant to set forth the accounts thereof, and as prayed that the said accounts might be taken and the share of Walter Harris ascertained and paid, and for the injunction, pleaded that the said Walter Harris and the defendant never entered into copartnership together as postmasters, &c., or in any other business whatever; and he prayed the judgment of the court whether he ought to be compelled to make any further answer to so much of the bill; and not waiving his plea, but insisting thereon, for answer to the residue of the bill, and in support of his plea, said, &c. The answer to the allegations and charges of the bill then followed; and, among other things, the defendant admitted that he had in his possession divers documents relating to the said business,[1] but, "save as aforesaid," he denied that he had any documents whereby the truth of the said matters would appear; and he insisted that, inasmuch as the said docu-

[1] No schedule or other description of the documents was given.

ments which were in his possession related exclusively to his own title, and did not in any way tend to make out or support the said alleged claim of the plaintiff in respect of the matters in the bill mentioned, he (the defendant) was not bound, and ought not to be required to produce the same.

The plea was set down and came on for argument.

Mr. *Temple* and Mr. *Miller*, for the plea.

Mr. *Kenyon Parker* and Mr. *Winstanley*, for the bill.

The cases referred to were Denys *v.* Locock,[1] Cork *v.* Wilcock,[2] M'Gregor *v.* East India Company,[3] Hardman *v.* Ellames,[4] and Dell *v.* Hale.[5]

VICE-CHANCELLOR. The bill alleges that a partnership in trade existed between Thomas and Walter, that Walter has since died, and the plaintiff is his personal representative; and that the defendant Thomas has carried on the trade since the death of Walter. The bill suggests a pretence by the defendant that there was no partnership; it contains averments and charges of facts as evidence of the partnership, and from which the truth of the matters in the bill, it is alleged, would appear; and it prays a discovery and account. The defendant met the bill by a plea of no partnership: that plea, however, covered many facts alleged by the bill, which, if true, would have been evidence of the partnership, and it was therefore overruled, but leave was given to amend the plea.

The defendant has now put in a plea and answer: the plea is confined to certain parts of the bill; and the plea does not appear to cover any parts of the bill as to which a discovery can be material to the plaintiff, and is therefore so far properly framed; for the plaintiff, by excepting to the answer, may get all the discovery to which he is entitled. But the question is whether that is enough, — whether it is sufficient that the plaintiff has the means of obtaining the discovery upon exceptions, and whether he is not entitled to have upon the file, at the time of the argument of the plea, an answer to every material averment in the bill which the plea does not cover. This, according to decided cases, appears to depend upon the point whether the plea is one which (in technical language) is said to require an answer to support it. The cases in which this is necessary are those which Lord Redesdale calls anomalous pleas, and which Mr. Beames calls incongruous pleas.[6] The example put by Lord Redesdale is that of a bill brought to impeach a decree on the ground of fraud used in obtaining it, where the decree may be pleaded in bar of the suit with averments negativing the

[1] 8 Myl. & Cr. 205. [2] 5 Madd. 328. [3] 2 Sim. 452.
[4] 2 Myl. & K. 732. [5] 2 Y. & Coll. C. C. 1.
[6] See Points in the Law of Discovery, p. 171 *et seq.* ed. 2.

charges of fraud, supported by an answer fully denying them.[1] There are other familiar examples, as in the case of a defendant who pleads a deed or conveyance which the plaintiff alleges to have been obtained with notice of his equity, charging facts which would be evidence of such notice; or a defendant pleading the Statute of Limitations where the plaintiff alleges the existence of facts which would go to prove a subsequent acknowledgment of the debt sufficient to take the case out of the statute. Foley *v.* Hill.[2] The defendant must support his plea, in the one case, by an answer as to the facts alleged as evidence of the acknowledgment; and, in the other case, by an answer to the allegations tending to show the alleged notice. If the plea be not supported by such an answer at the time of the argument, the defendant has not excluded the intendments which will be made against himself under the rule that, "upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken to be true."[3] The plea now before me is a negative plea, but so in fact are all those examples of anomalous pleas to which I have referred; and it appears to me that the same reasoning must be applied to the plea in the present case as in the cases I have mentioned. Sir John Leach, indeed, expressly refers to pleas of the one sort as furnishing the rule for the other. The reason for requiring the answer as to the facts alleged in proof of the fraud, or notice, or acknowledgment, in the cases suggested is, that a mere general averment is in such cases equivocal; it might be only a legal conclusion which the defendant conceives may be drawn from the actual facts, or which he undertakes to draw from those facts. Now, the court does not trust a party to draw for himself a conclusion of law, but the court requires to know the facts upon which it is founded, that it may consider whether the premises justify the conclusion; not to try whether the plea is true (which is the business of the hearing, not of the argument), but to try whether it substantially meets the case made by the plaintiff. The only doubt which occurred to me was, whether the simple question of partnership or no partnership afforded room for that equivocal or possibly evasive denial against which the rule is intended to guard. Partnership is, however, a mixed question of law and fact. There may be circumstances which would have the legal effect of creating a partnership, whilst one of the partners may desire to repudiate, and may think there are grounds for repudiating, that legal consequence. This point, however, scarcely arises in the present case. The bill charges that the defendant has in his possession books, accounts, and papers, by which the truth of the

[1] Tr. Plead. 239, ed. 4; Beames, El. Plead. 6.
[2] 3 Myl. & Cr. 475.
[3] Tr. Plead. 256, 271, 298, ed. 4; 2 Sch. & Lef. 727.

matters alleged — that is, the formation and continued existence of the partnership until the death of Walter — will appear. The answer states, in effect, that the defendant has books, accounts, and papers of his own, which, he submits, he is not bound to produce; and, excepting these, he has not any documents by which the truth of the alleged matters would appear: that it would appear upon the documents he has in his possession he does not deny, and he therefore, for the purpose of the argument, admits it. The plea, therefore, while it avers that there was no partnership, admits that the truth of the contrary would appear by evidence in the possession of the defendant; and this renders the plea, though it may be good in form, substantially bad. The defendant, in effect, undertakes to draw a conclusion of law; but the intendment being against the pleader with respect to the facts not denied, the result is that the defendant must, for the purpose of the argument, be considered as having drawn a conclusion, with regard to the effect of the evidence in his possession, which is adverse to the averment by his plea.

Such, as I understand the subject, is the result of the authorities. I do not overrule the plea in this case on the ground that the answer would prove it to be untrue; for this is not the time, nor are there materials before the court upon which to enter into the question of the truth of the plea: that is the question at the hearing. Nor do I overrule the plea because the answer is not technically sufficient: that would be properly determined upon exceptions. The ground on which I proceed is, that the rules of pleading (whether well or ill applied to such a case as this is not the question [1]) require that the defendant should have supported his plea by an answer to this material allegation; and that his plea, therefore, fails in substance to meet the case made by the plaintiff.

[1] Points in the Law of Discovery, 175, pl. 250, ed. 2.

CLAYTON v. THE EARL OF WINCHELSEA.

IN THE EXCHEQUER. APRIL 28, 1839, AND JANUARY 18, 1840.

[*Reported in* 8 *Younge & Collyer*, 426, 688.]

THE bill, which was filed by the plaintiff as Rector of Cottingham, otherwise Cottingham-cum-Middleton, in the county of Northampton, stated that part of that parish was situate in the bailiwick of Rockingham and in Rockingham Forest, and comprised, amongst other lands, Benefield Lawn or Park, and three other enclosures named in the bill. That by an act passed in the second and third year of the reign of King William the Fourth, so much of the forest of Rockingham as was situate within the bailiwick of Rockingham was disafforested and enclosed. That from time immemorial to the passing of the act the soil and freehold of the said lawn and enclosures had been vested in the crown, and had been held by prescription in right of the crown free of tithes. That by virtue of the act the lawn and enclosures had been conveyed to and were vested in the defendant, the Earl of Winchelsea, and his heirs, and that other lands mentioned in the bill, which were in the same parish and had likewise been disafforested, were conveyed to and vested in the same defendant and in the defendant Sir Arthur B. de Capel Brooke and his heirs. That by means of the forestal and other rights and privileges of the crown the lands in question had for many years remained uncultivated, and no tithable matters or things had been taken from them; but that since the passing of the said act the defendant, the Earl of Winchelsea, and his tenant, the defendant, Thomas Meadows, had occupied the Benefield Lawn and the three enclosures, and greatly cultivated and improved them, and that the defendant Sir A. de Capel Brooke had likewise occupied the other lands mentioned in the bill, and greatly cultivated and improved them. That since the passing of the act the defendants had respectively had growing and arising on and from the said lands and premises, so held and occupied by them respectively as aforesaid, great quantities of corn, grain, and pulse, &c. [Here followed the allegation which was met by the plea.]

The bill then stated that there were due from the defendants considerable sums of money in respect of the before-mentioned tithable matters, and that the plaintiff had frequently applied to them to discover to him the particulars, numbers, and quantities of such tithable matters so received by them, and to account for the same, but that they had refused so to do, pretending various moduses, exemptions, and discharges, &c., and also pretending that Benefield Lawn was extra-parochial, and that for that reason the tithes thereof were not due to the plaintiff. In contradiction to the latter pretence, the bill charged that various distresses had taken place upon Benefield for poor's rates and highway rates for the parish of Cottingham.

The bill then charged that the defendants have now or lately had in their possession, custody, or power, or in the possession, custody, or power of their respective solicitors or agents, divers deeds, documents, awards, maps, plans, surveys, estimates, books, accounts, receipts, and writings mentioning, or referring to, or containing some entries or entry relating to the matters aforesaid, or some of them, and in particular to the title of the crown of England to the aforesaid lands and premises, and in particular also to the said alleged moduses, exemptions, and discharges, from or by which particulars, if produced, the truth of the several matters and things hereinbefore stated, and the title of plaintiff to the aforesaid tithes or some of them will appear, or may be deduced or proved, or which will furnish evidence important and useful to plaintiff with reference to the matters in question in this cause, and that in particular the said defendants, the Earl of Winchelsea and Thomas Meadows, have now, or lately had, in their possession, custody, or power respectively, and in the possession, custody, or power of their respective solicitors or agents, divers deeds, &c., in which the said lawn, or some part thereof, is mentioned, or described, or referred to, as situate within, or as part of the said parish of Cottingham.

The bill then, after suggesting that the defendants ought to set forth the schedule of the documents before mentioned, prayed an account of the tithes.

To this bill the defendant, the Earl of Winchelsea, put in the following plea:—

That this defendant hath not since the passing of the act of Parliament in the bill in that behalf mentioned, had growing or arising on or from any part of the lands or premises in the bill mentioned any corn, grain, pulse, or grass, whether clover or other grass, which he has mowed or cut, or made into hay. And that this defendant hath not kept or fed on the said lands, or any part thereof, any ewes or other sheep which have been shorn or yielded any wool, nor any lambs, nor any cow which has produced calves or milk; nor kept, fed, or agisted

on the lands and premises in the bill mentioned, or any part thereof, any horse or barren or unprofitable cattle, sheep, or lambs; nor kept on the said lands and premises, or any part thereof, any hens, ducks, or poultry which have produced divers or any eggs, chickens, ducklings, or other poultry; nor hath this defendant had any fruit or garden-stuff growing or renewing upon the said lands and premises, or any part thereof; nor hath this defendant had growing or renewing upon the said lands and premises, or any part thereof, any wood, coppice, or plantation, from which he has cut or felled any young trees, poles, or saplings, or underwood; nor hath this defendant had growing or renewing upon the said lands and premises, or any part thereof, any other tithable matters or things, whether great or small tithes; and this defendant doth therefore plead the matters aforesaid to the said bill, and the relief and discovery thereby sought.

Mr. *Simpkinson* and Mr. *G. L. Russell*, for the bill. That which is called a plea to the present bill is no more than an insufficient answer. It does not tender that kind of issue which it is necessary to tender on a plea. The question is not reduced to one simple point, but, on the contrary, ten or a dozen different issues are taken. The case of Wing *v.* Murrells[1] decides that such a complicated sort of plea is not admissible. No doubt the issues here taken all converge to the point that the plaintiff is not entitled to an account; but if that mode of framing a plea is allowable, a plea may be used in all cases. There are other objections to the plea in point of form, such that the word "and" is used instead of the disjunctive "or," and that the plural alone is used as to the tithable matters of which the defendant denies the perception; for instance, that he has not had any "sheep or lambs," "hens, ducks, or poultry," "tithable matters or things," it being evident that, consistently with the plea, he may have had one of each of these things. Again, this plea should have been accompanied with an answer to the charge of the possession of the books, papers, and documents. Hardman *v.* Ellames;[2] Jones *v.* Davis.[3] The charge as to papers and documents is not in the usual form in this case, but is directed to particular matters, and it expressly avers that the papers and documents sought would furnish evidence important and useful to the plaintiff in the matters in question, or, in other words, would furnish evidence which would overrule the plea.

Upon that point, therefore, this case is distinguishable from Macgregor *v.* The East India Company[4] and Forbes *v.* Skelton,[5] which perhaps may be relied upon on the other side. Harland *v.* Emerson.[6]

[1] 11 Price, 723. [2] 2 M. & K. 732. [3] 16 Ves. 265.
[4] 2 Sim. 454. [5] 8 Sim. 335. [6] 8 Bligh, N. R. 62

Mr. *Boteler* and Mr. *Stuart*, for the plea. The plea in substance reduces the defence to a single point, namely, that the defendant has had no tithable matters during the term stated in the bill. Negative pleas have been allowed ever since the time of Lord Thurlow. Hall *v.* Noyes;[1] Drew *v.* Drew;[2] Warrington *v.* Mothersill.[3] Here the plea amounts to a simple negative that the defendant has had any tithable matters or things. Admitting the particular negatives to be surplusage, the general negative that he has had any tithable matters or things will be sufficient. It is the same in the case of a general plea of no partnership, where a number of circumstances constituting the partnership are stated in the bill.

Secondly, the averment that the defendant has taken no tithable matters or things is sufficient, without adding the words "or matter or thing" in the singular.

Thirdly, it is not necessary for the defendant to answer the charge as to books and papers, that charge being merely general. Sanders *v.* King;[4] Thring *v.* Edgar;[5] Watkins *v.* Stone.[6] If the plaintiff had made a specific charge anticipating the defence, and calling for documents removing the defence, the defendant would have been bound to answer any charge as to such documents. If, for instance, the plaintiff had alleged that though the defendant pretended that he had taken no tithable matters, yet the contrary was the truth, and the defendant had in his custody papers, &c., which would show that he had taken such tithable matters, it would have been necessary for the defendant to answer this charge. But, according to the recent decisions, it is not necessary to answer a general charge as to papers and documents. Baldwin *v.* Peach.[7] [The LORD CHIEF BARON. Where the bill is simply for an account, it is difficult to see how the charge as to books and papers can be otherwise than general.]

Mr. *Simpkinson*, in reply. It is not denied that there may be such a plea as a plea of no tithable matters. But this is not a general plea of that nature, but a plea denying a string of facts, and then throwing them at the head of the court to draw an inference from them. Wing *v.* Murrells is completely in point. Baldwin *v.* Peach was not the case of a negative plea. It proceeded on a fact not stated in the bill, namely, that the defendant had been twenty years in adverse possession. It was, therefore, clearly unnecessary to answer any charge which the bill made as evidence of a totally different statement of facts. [The LORD CHIEF BARON. If there had been a charge to meet the defence of adverse possession, as, for instance, if the plaintiff had

[1] 8 Bro. C. C. 489. [2] 2 Ves. & Bea. 159. [3] 7 Price, 666.
[4] 6 Madd. 61. [5] 2 S. & S. 274. [6] Id. 560.
[7] 1 Y. & C. 453. The second marginal note in this case is too general.—J. C.

charged that there were in the defendant's power divers letters and documents, which, if produced, would show that he had not been in adverse possession for twenty years, the defendant must have answered that charge.] That is precisely the same principle upon which Hardman v. Ellames was decided.

The LORD CHIEF BARON.[1] I have formed an opinion upon this case in the course of the argument. The principles which all the cases establish, though some of them approach to the doubtful confines of it, is this: that a plea which covers every thing that the defendant is bound to answer is admissible, though framed in the negative; and here, if all the allegations of the plea made a complete answer to the bill, I should have thought it a good plea. The old practice was to put in a full answer to the whole bill, but it was afterwards held that if a party, by pleading collateral matters, as, for instance, an act of Parliament, could show that the plaintiff had no title, he might do so. In such case he admits the whole bill, but pleads certain matters, independent of the bill, to protect him; then, if those matters are not deemed sufficient, he must put in a full answer. The next step was for a party to put in a negative plea, that is to say, a plea negativing the title of the plaintiff as stated on the record. It required some struggle in the courts to establish that practice, but the arguments derived from good sense at length prevailed, and it was held to be competent for the defendant to adopt that sort of plea, provided that from the point pleaded to was deduced an answer to the whole bill, as in the case of the plea of no heir. So other matters were held to be a proper subject for a plea of this nature, though in the negative form. In the case in the House of Lords,[2] though the form of the plea was in the affirmative, yet, in substance, it was a negative plea, denying the plaintiff's title *ex parte materna*.

Now, what are the circumstances required to support a negative plea? They must be such as will serve as a defence for you, though you admit every thing in the bill except the matter expressly negatived. If the plea is not sufficient for that purpose you must support it by an answer. In the case like that in the House of Lords, though you might deny that the plaintiff was heir *ex parte materna*, yet if you did not also deny that you had documents which tended to show that he was heir *ex parte materna*, you would be required to answer a charge to that effect. The principle, therefore, is, that where a party selects a part of the bill, which he denies by his plea, if there be any part which calls for a discovery as to the matter upon which he pleads, the plea is not good unless he supports it by an answer.

It was argued by the counsel for the defendants that the bill ought to

[1] Lord Abinger. — ED. [2] Harland v. Emerson, 8 Bligh, N. R. 62.

have specified more distinctly the object for which the production of the documents alleged to be in the custody of the defendant was sought, and that an answer ought not to be given to a charge as to papers and documents unless it is made in very specific terms. It is true that, in one sense, the charge in the bill is not very specific as applied to this case. But if Lord Winchelsea had selected any of the inducements in the plaintiff's bill constituting his title, and had denied those inducements, he must have denied that he had documents to prove the statements in the bill. It is said that he has selected something else, and that, therefore, no specific denial as to that part of the bill is necessary; and certainly, in one sense, there is ground for that observation. Here, no doubt, the charge in question is a general charge; but then it is a charge relating to the only thing required by the bill. The form of the plea shows that the bill is reduced to a mere bill for discovery of tithable matters. You admit that the matters mentioned in the bill are tithable, but you deny that you have taken any tithable matters. Try it another way. Suppose, instead of a plea, he were to put in an answer to this bill. He might say, I admit all that you have stated in your bill except one thing. I admit your title, — I admit that the lands are tithable, — but I deny that I have taken any tithable matters. His answer would be incomplete without denying that he had books from which the truth of all the allegations in the bill would appear. Now, then, reverting to the plea, if the plaintiff is not entitled to the same denial in this case, he would be without the advantage he would have had if an answer had been filed instead of a plea. If the defendant were compelled to produce the books, it might appear that he was mistaken in his plea, and that he had taken tithable matters.

Upon the whole, it appears to me that the plaintiff is not necessarily bound, in his charge relating to papers and documents, to make a separate allegation as to each matter to which he conceives those documents to apply, and that the defendant, by selecting for the purpose of his plea certain parts of the bill to which the charge of papers and documents does not expressly apply, is not thereby relieved from answering the general charge. No doubt if the plaintiff charges matter to meet by anticipation the defence, he must charge specially that which would assist him upon the particular point on which he conceives the defence will rest, but as to the general main object of the bill it is not necessary to make a specific charge, because the bill itself is a charge.

As to the other point, I think that if the defendant had pleaded generally that he had taken no tithable matters or things, the plea would have been right without further words. But if he pleads in a

negative form to all the particulars stated in the bill, he must take care that the negative is pursued throughout, and that there is no negative pregnant. Therefore, perhaps the allegation that he has taken "no ewes," &c., without adding words in the singular number, is not sufficient. But in overruling this plea I wish to proceed upon the broad grounds which I have already stated, and which appear to me to meet the substantial justice of the case. Should I feel any doubts upon the case I will mention it again. *Plea overruled.*

January 18, 1840.

Leave having been given to the defendant, Lord Winchelsea, to amend his plea, the amended plea now came on for argument.

It should here be remarked, in explanation of some parts of the argument used on the present occasion, that the bill contained a charge that the defendants "have respectively had growing, increasing, and renewing upon the said lands and premises divers woods, coppices, and plantations from which they have respectively cut and felled divers quantities of young trees, poles, and saplings, and divers quantities of underwood, which they have carried away." And the interrogating part of the bill contained this inquiry: "Whether, since the passing of the said act, &c., the said defendants respectively, or some or one, and which of them, have or has not had growing, increasing, and renewing upon the said lands and premises so occupied by them respectively as aforesaid, or some and what part or parts thereof, woods, and whether or not coppices, and whether or not plantations, and whether from them, or some or one, and which of them, the said defendants respectively, or some or one, and which of them, have not, or hath not, cut and felled, and whether or not carried away, divers large, or some, and what quantities of young trees, and whether or not of poles, and whether or not of saplings, and whether or not divers large, or some, and what quantities of underwood?"

The defendant, Lord Winchelsea, put in the following amended plea and answer:—

This defendant, &c., as to the whole of the relief sought by the said bill, and also as to the whole of the discovery sought by the said bill, except such discovery as is sought by so much of the said bill as calls on this defendant to answer and set forth whether this defendant and the other defendants named in the said bill respectively, or one and which of them, have not, or hath not now, and had not lately, and when last in their or his possession, custody, or power, &c., divers, or some, and what deeds, &c., mentioning, or referring to, or containing some entries or entry relating to such of the matters in the said bill mentioned as are hereinafter pleaded unto, or some or one, and which

of them; and whether such documents, or some or one, and which of them, would not furnish evidence important and useful to the said plaintiff with reference to such of the matters in question in this cause as are hereinafter pleaded unto, or some or one, and which of those matters, — doth plead thereto; and for plea thereunto saith that this defendant hath not, since the passing of the act of Parliament in that behalf mentioned, had growing or arising, &c., any corn, &c. [this part of the plea was in the same form as *ante*, pp. 161–162, except that the articles were mentioned in the singular as well as the plural number], or had growing, increasing, or renewing upon the said lands and premises, or any part thereof, any woods or wood, coppices or coppice, plantations or plantation, from which he has cut or felled any young trees or tree, or other trees, or tree poles, or saplings or sapling, or any underwood, which he has carried away; or had growing or renewing upon the said lands and premises, or any part thereof, any other tithable matters or matter, things or thing, whether great or small tithes or tithe. And this defendant doth therefore plead the matters aforesaid, and doth demand the judgment of this honorable court whether he shall be compelled to make any further answer to so much of the said plaintiff's said bill as he has before pleaded to. And this defendant, not waiving his said plea, but relying thereon, for answer to so much of the said bill as he has not pleaded to, saith that he and the other defendants in the said bill named have not, and never had, in their joint possession, custody, or power, &c., and this defendant never had in his possession, custody, or power, &c., any deeds or deed, &c., mentioning or referring to, or containing any entries or entry relating to such of the matters in the said bill mentioned as are hereinbefore pleaded unto as aforesaid, or any or either of them, or which would furnish evidence important or useful to the said plaintiff with reference to such of the matters in question in this cause as are hereinbefore pleaded unto, or any or either of them. All which matters, &c.

Mr. *Simpkinson* and Mr. *G. L. Russell*, for the bill. This plea does not differ from the former in negativing the perception of the several tithable articles *seriatim*. Therefore the objection arising from Wing *v.* Murrells[1] still applies. Your Lordship's decision, however, on the former hearing of the plea, proceeded principally on the ground that the defendant had not answered the general charge as to the possession of papers and documents. But it is clear from several authorities that the defendant is not bound, and ought not to answer such a charge; and in Macgregor *v.* The East India Company[2] the plea of the Statute of Limitations was allowed, although the defendants neither by their plea nor their answer negatived the general charge as

[1] 11 Price, 728. [2] 2 Sim. 452.

to papers and documents. [The LORD CHIEF BARON. I am at a loss to know how that plea was good. How can the Statute of Limitations be pleaded to a bill of discovery? It is a good plea at law.] In Forbes *v.* Skelton,[1] which was not a bill of discovery, the same thing was held. At all events, where a partial answer is given, as is the case here, it overrules the plea. It is true that you may answer to the whole of the discovery, and plead or demur to the relief; but if you answer to part of the discovery when your plea or demurrer would otherwise be good, the answer overrules the plea or demurrer. Hodgkin *v.* Longden;[2] Blackett *v.* Langridge;[3] Sherwood *v.* Clark;[4] James *v.* Sadgrove;[5] Thring *v.* Edgar;[6] Denys *v.* Locock.[7] Here the charge in the bill is specific, only *quoad* the books, papers, and writings relating to the *title;* general as to the tithable matters. Now the defendant has not answered the specific charge, but only the general charge, and therefore his answer overrules the plea. Another objection to this plea is, that even as it now stands it does not cover all the statements in the bill. It is quite consistent with the plea that Lord Winchelsea may have cut the wood and sold it afterwards. He is asked whether he has not cut and whether he has not carried away? His answer is, that he has not cut any wood which he has carried away. But he may have cut without carrying away, and the wood so cut would be tithable. Eagle on Tithes, vol. i. p. 282.

Mr. *Boteler*, Mr. *Stuart*, and Mr. *Parry*, for the plea. Upon the argument of the plea on the former occasion your Lordship was of opinion that the defendants ought to have answered this charge, which in substance is special, being directed to the perception of tithable matters, though in form general. The principle upon which your Lordship proceeded is now fully recognized, and it may be doubted whether the propositions laid down by Sir John Leach, in Thring *v.* Edgar and James *v.* Sadgrove, can, to their fullest extent, be supported. The second marginal note, however, in the latter case, refers to the principle in question. The principle is that if there be a bill seeking relief, and seeking discovery incidental to that relief, a plea going to the whole relief puts the bill out of court; but if the incidental discovery sought might prove that which the plea undertakes to displace, the defendant must accompany the plea with an answer to the discovery. It is said that if the defendant answers to the general matter of discovery, the answer would overrule the plea. We concede that; but here it is alleged against us as a sole ground of relief that we have taken divers tithable matters, and the bill contains a charge that we have

[1] 8 Sim. 335. [2] 8 Ves. 2. [3] 4 Gwill. 1368.
[4] 9 Price, 259. [5] 1 S. & S. 4. [6] 2 Ejusd. 272.
[7] 3 M. & Cr. 226.

certain documents which would prove the matters thereinbefore stated. One, and the principal of these matters, is, that we have taken tithes, and in regard to the omission to answer the charge as it relates to that particular matter, your Lordship was of opinion that the defence did not cover the whole bill. That decision was sound and unimpeachable on any ground whatever, and the only question is, whether the defendant, as the defence now stands, has transgressed the limits of the answer. Now, undoubtedly, upon the authority of Thring *v.* Edgar and Hardman *v.* Ellames,[1] it is necessary for the defendant in denying this charge to confine his answer to the special matter charged, but we conceive that the frame of this plea is unexceptionable on that point.

As to the other objection, it is submitted that the allegation that the defendant has taken no "other tithable matters" will be sufficient to supply the omission, if any, in the pleading as to the wood. [The LORD CHIEF BARON. I think not. I think that charge only relates to other *species* of tithable matters. The point to be considered is whether it is not sufficient if the plea follows the words in the charge, without following the words in the interrogating part of the bill.] It is conceived that a plea so framed will be sufficient. It is not thought necessary, on a plea of no administrator, to deny that the defendant has received the personal estate of the deceased in any other character. It is sufficient if he deny the allegation in the bill that he is an administrator.

Mr. *Simpkinson*, in the course of his reply, contended that the charge which the defendant had answered was merely general, and by no means amounted to a specific statement that the defendant had books which show that he had taken tithable matters.

The LORD CHIEF BARON. It appears to me that the question in this case rests on a simple point. In determining these cases one would be desirous, if possible, to show that the pleadings both at law and in equity were reconcilable with common sense; and I think that, upon a careful examination of the principles on which they rest, they will, generally speaking, be found to be so. Now, I think that the distinction which may serve to reconcile many of the cases on this subject is that which exists between a negative and affirmative plea. If you charge matters in the bill, and demand discovery as to those matters, and the defendant pleads affirmative matter, the issue of which lies upon him to prove, and he then goes on to answer any matter charged in the bill, the answer overrules the plea, because it is wholly immaterial to the plea. But if he plead a negative plea, that is to say, if he traverses matters charged in the bill, and the bill not only alleges those matters, but also that the defendant has documents which would prove

[1] 2 M. & K. 732.

them, the plea is not satisfactory if he does not also deny the possession of those documents. The plaintiff has a clear right to a defence upon both points. No doubt the defendant by his plea denies what the plaintiff puts in issue, and may do so conscientiously enough; but if the plaintiff calls on him to produce documents to prove the issue, it is not sufficient if he do not make some statement as to that which relates to the proof of the allegation.

It is said, indeed, by the learned counsel for the plaintiff, and very justly, that in this bill there is no special charge that the defendant has deeds which would show that he had taken tithable matters; but surely the general charge is sufficient to embrace that. It states, generally, that the defendant has documents in his possession which would tend to show the truth of the matters charged in the bill, or some of them. Suppose he had a book showing the produce of corn for the last year, that would be a document. I think that a plea, in order to be a good defence as a negative plea, ought to go on to meet that part of the bill which relates to the proof of the matter of the plea. An affirmative plea stands on a different ground.[1]

As to the pleas of the Statute of Limitations, they stand by themselves. I cannot see, on the principles of common sense, how a defendant can to a bill of discovery plead the Statute of Limitations, because that is a plea at law. It is unnecessary, however, to dwell upon that point, or to overrule cases which are not before me: it is sufficient to say that those cases are not applicable here.

Then as to that part of the plea which relates to the wood. I cannot say that my mind is entirely free from doubt on that point, but on the whole I think the plea is a sufficient answer to the charge. I do not think it necessary that the plea should go beyond the words of the charge. Suppose the defendant had cut wood which he had not carried away; *non constat* that he would have got the tithe from the person to whom he sold it. The plaintiff charges him only with the tithe of poles, wood, &c., *which* he has cut and carried away. Certainly the interrogating part goes to both points, — the cutting *and* carrying away; and he might have answered as to both points; but I think I should stand too much on forms of expression if I did not say that the plea was a sufficient answer to the charge. *Plea allowed.*

[1] The same doctrine applies to an affirmative plea, where the bill contains charges anticipatory of such a plea. Mitf. Pl. 271, 274; Story on Pleading, §§ 754, 806.

PARKER *v.* ALCOCK AND ANOTHER.

IN THE EXCHEQUER. MAY 18, 1827.

[*Reported in* 1 *Younge & Jervis*, 432.]

THE plaintiff in this case, an officer in the navy, filed his bill, stating various transactions and money dealings between himself and the defendants, who were attorneys, from September, 1824, to August, 1825, imputing to them, in a series of transactions, unfair dealing, fraud, and oppression; alleging the false charges in their accounts to amount to a considerable sum of money; impeaching the consideration of the deeds therein mentioned; and charging that, he being in embarrassments, dependent upon them for the means of support, and completely in their power, they had fraudulently, oppressively, and by misrepresentation, prevailed upon him to execute to them certain mortgages, and an agreement for the sale of all his real and personal estate, of which they then had possession, for a sum greatly below its value; and eventually, by fraud, oppression, and misrepresentation, had obtained from him a general release, of the purport and effect of which he was, at the time he executed it, perfectly ignorant; and praying a discovery and general account, that the mortgages, agreement, and release might be set aside, or decreed to stand as a security for such sum only as should be found to be due; and that, subject to such lien, the defendants might be directed to reconvey the property, a fit person being appointed to receive the rents and profits thereof.

To all the relief and to the discovery, except as hereinafter mentioned, the defendants pleaded a release of the 11th August, 1825 (averring that it was freely and voluntarily executed by the plaintiff, with a full knowledge of its nature and effect, in consideration of £3300 thereupon paid to him by the defendants; that it was not fraudulent; and that the plaintiff was not, at the time he executed it, dependent upon them for pecuniary supplies, or in any respect within their power); and answered circumstantially such parts of the interrogatories as were referred to by the averments in the plea.

The plea was this day argued by *Bickersteth* and *Monroe*, for the defendants; and by *Martin* and *Knight*, for the plaintiff.

For the defendants, it was contended that the plea was good, there being averments in that respect supported fully by the answer that the release was given by the plaintiff freely and voluntarily, with a full knowledge of its purport and effect; and that, conceding the original transactions to have been fraudulent, it was competent for the parties, by a settlement, to make reparation.

On behalf of the plaintiff, the cases of Salkeld *v.* Science,[1] and Roche *v.* Morgell,[2] and Mitford's Pleading,[3] were referred to; and it was urged that the validity of the release depended upon the circumstances of which a discovery was sought; and that as every thing alleged in the bill, and not denied by the answer in support of the plea, must be taken to be true, the facts impeaching the release and its consideration stood admitted; and that therefore the release ought not to preclude the court from decreeing to the plaintiff the relief prayed.

ALEXANDER, L. C. B. The character in which these parties appear before the court, although it can form no ingredient in our decision, yet induces me to look more narrowly into the case than I should otherwise probably have done. I take it to be a clear proposition in pleading, that when a defence of this sort is resorted to, it is necessary that every allegation which is contained in the bill should be generally and substantially negatived by averments in the plea, and fully and formally denied by the answer. Upon this rule, if the only ground of objection to the release had been that it was not, at the time of its execution, read over by the plaintiff, who was ignorant of its purport and effect, that would, I think, have been sufficiently disposed of by the plea and answer; but it appears from a fair construction of the bill that the release, although in its terms general, was founded upon a previous statement of accounts, which are charged to have been fraudulent: this strikes at what is the consideration of the release, and not being met by the plea and answer, is sufficient to avoid the plea.

This opinion which I have expressed does not decide the merits of the case, but turns upon the form of the plea only. Let it therefore stand for an answer, the plaintiff having liberty to except.

The other barons concurring, the plea was overruled, and ordered to stand for an answer, with liberty for the plaintiff to except.

[1] 2 Ves. 107. [2] 2 Sch. & Lef. 721. [3] P. 212.

CHADWICK *v.* BROADWOOD.

BEFORE LORD LANGDALE, M. R. MARCH 20, 1841.

[*Reported in* 8 *Beavan*, 808, 580.]

THIS case came before the court upon a plea to a bill of discovery in aid of an action at law intended to be commenced by the plaintiff.

The bill stated certain conveyances of December, 1717, and July, 1720, under which Sir Andrew Chadwick became seised in fee of certain premises in Broad Street, St. James's; that by indenture of lease, which was supposed to bear date the 2d day of June, 1766, he demised a specific part of the property to F. Johnstone for sixty years, at a rent of £40 a year; and that he "executed divers other leases in writing of such of the same premises respectively as were not comprised in the lease of the 2d of June, 1766, at and under divers yearly rents, each such rent exceeding 40*s.* by the year, and for long terms of years, commensurate or nearly commensurate with the number of years which, at the respective dates of such other leases, was then to come in the said term of sixty years granted by the lease of the 2d of June, 1766; or at least the term of years granted by such other leases respectively were granted in such manner as that they would respectively expire at or about the time when the term of sixty years, granted by the lease of 2d of June, 1766, would expire, or within one or two years prior or subsequent to that time."

That on the 15th of March, 1768, Sir Andrew Chadwick died intestate as to his real estates, and without issue.

That upon the death of Sir A. Chadwick, the premises comprised in the deeds of December, 1717, and July, 1720, respectively, descended to the plaintiff's grandfather, Joseph Chadwick, who was the heir-at-law of the said Sir A. Chadwick, which said Joseph Chadwick was the eldest son of James Chadwick, who was the eldest brother of Ellice Chadwick, who was the father of Sir Andrew Chadwick, and which said James Chadwick died in the lifetime of the said Sir Andrew Chadwick, and that the plaintiff's said grandfather, Joseph Chadwick, as such heir-at-law, became well seised and entitled of and to the said several premises for an estate in fee-simple absolute in reversion, expectant

upon the determination of the said term of sixty years, and the other terms of years subsisting therein, and granted by the said Sir Andrew Chadwick as aforesaid.

That on the 7th of April, 1790, the plaintiff's grandfather, Joseph Chadwick, died intestate as to his real estates, and thereupon the said several premises descended to the plaintiff's father, Thomas Chadwick, who was his only son and heir-at-law, whereby Thomas Chadwick became well seised and entitled of and to a like estate in the same premises.

That on the 27th of August, 1801, the plaintiff's father, Thomas Chadwick, died intestate as to his real estates, and thereupon the several premises descended to the plaintiff, John Chadwick, as his only surviving son and heir-at-law, whereby the plaintiff became well seised and entitled to a like estate in the said premises.

That the said term of sixty years expired on the 24th of June, 1825, or about that time, and that the other terms of years granted by the said Sir Andrew Chadwick as aforesaid respectively expired at some time or times within two years, either prior or subsequent to the 24th of June, 1825.

The bill also stated that the plaintiff was seised in fee, and was entitled to have possession of the premises delivered up to him by the defendants, but that the defendants refused to deliver up the same, notwithstanding they and the person or persons through or under whom they claimed obtained possession of the said premises under or by virtue of the leases thereinbefore mentioned to have been granted thereof respectively; and as evidence thereof, the plaintiff showed that the said defendants, and the person and persons through or under whom they claimed, or some person or persons on their respective behalf, from time to time paid the rents reserved by the said leases respectively, and took receipts or acknowledgments in writing for the same, and that some of such payments were made to, and some of such receipts or acknowledgments were signed by, the said Sir A. Chadwick, Joseph Chadwick, Thomas Chadwick, and the plaintiff respectively; and although the others of such payments were made to, and the others of such receipts or acknowledgments were signed by, some other person or persons, yet such other person or persons received such payments and signed such receipts as the agent or agents for and on the behalf of Sir Andrew Chadwick, Joseph Chadwick, Thomas Chadwick, and the plaintiff respectively.

And that if the said defendants would discover and set forth, as they ought to do, the dates and contents of the several receipts or acknowledgments for rent paid as aforesaid by them, or by any person or persons through or under whom they claimed, and the name or names,

and description or descriptions of the person or persons who received the said payments respectively, and who signed the said receipts or acknowledgments respectively, it would appear, or the plaintiff would thereby be enabled to prove, that all such payments of rent as aforesaid were made to, and that all such receipts or acknowledgments were signed by, Sir A. Chadwick, Joseph Chadwick, Thomas Chadwick, and the plaintiff respectively, or by some person or persons on their respective behalf. And it is also stated that the plaintiff was unable to proceed in his contemplated action "without a discovery of the several matters, or without the production by the defendants of the several deeds and documents therein respectively inquired after, and especially without the production by the defendants of the leases and counterparts of leases, and the receipts or acknowledgments for rent thereinbefore mentioned, which indentures, counterparts, receipts, and acknowledgments were then in the possession of the defendants."

To this bill the defendant put in a plea, which, after excepting certain parts of the discovery which he afterwards answered, pleaded "that Joseph Chadwick never was, and that the plaintiff was not the heir-at-law of Sir Andrew Chadwick, deceased, and that the premises did not, nor did any of them, ever descend to Joseph Chadwick as the heir-at-law of Sir A. Chadwick, deceased, or to the plaintiff's father, Thomas Chadwick, as the only son and heir-at-law of the said Joseph Chadwick, or to the plaintiff as the only surviving son and heir-at-law of Thomas Chadwick; and that Joseph Chadwick never did become seised of or entitled to the said premises, or any of them, as the heir-at-law of Sir A. Chadwick; and that Thomas Chadwick never did become seised of or entitled to the said premises, or any of them, as the heir-at-law of Joseph Chadwick; and that the plaintiff never did become seised of or entitled to the premises, or any of them, as the heir-at-law either of Sir A. Chadwick, or Joseph Chadwick, or of Thomas Chadwick; for that Ellice Chadwick, the father, never had an elder brother named James, and never had a brother named James who had or left issue; and Joseph Chadwick, the plaintiff's alleged grandfather, was not the son of any James Chadwick who was a brother of Sir A. Chadwick's father, Ellice Chadwick; and therefore the defendant pleaded the matter aforesaid to so much of the said bill as aforesaid, and humbly prayed the judgment of the court whether he ought to make any further answer to so much of the said bill as was before pleaded to."

The plea was accompanied by an answer in effect denying the possession of any documents, &c., showing the alleged links of the pedigree, or the several descents or seisins, but there was no denial of the payment of rents as alleged in the bill.

Mr. *Girdlestone* and Mr. *Teed*, in support of the plea.

Mr. *Pemberton* and Mr. *Bird*, contra. The plea is open to several objections. First, it is a negative plea to a bill of discovery: it puts in issue the very point to be determined at law, and in aid of which this bill of discovery has been filed; so that the legal point would, in the first place, have to be determined in equity, without that very preliminary discovery which the plaintiff alleges is necessary to enable him to establish his right.

Secondly, the plea is multifarious, raising many distinct issues, and not reducing the defence to a single point. It says that Joseph was not heir of Sir Andrew: that the plaintiff is not heir. That the estate did not descend to Joseph, or to Thomas, or to the plaintiff; and that neither Joseph, nor Thomas, nor the plaintiff were seised. You cannot plead these distinct facts, heirship, descents, and seisins of several parties, which may exist independently of each other.

Thirdly, the plea is argumentative, for it states as a reason that Ellice never had a brother James, and never had a brother James who left issue, and Joseph was not the son of any James who was the brother of Ellice.

Fourthly, the plea is either overruled by the answer, or is not sufficiently supported thereby. The defendant answers as to the possession of receipts for rents, but does not answer as to whether any rent was paid. If, therefore, he was right in answering the former, he was wrong in not answering the latter; and if the latter were properly omitted, the plea is overruled by the answer to the former. Thring *v.* Edgar;[1] Hardman *v.* Ellames;[2] Sanders *v.* King;[3] Harland *v.* Emerson;[4] Gun *v.* Prior.[5]

Mr. *Girdlestone*, in reply. Whatever doubts might have formerly existed, it is now settled that a plea may be filed to a bill of discovery. Gait *v.* Osbaldeston.[6]

[The MASTER OF THE ROLLS. Suppose a bill of discovery in aid of an action at law showed on the face of it that the plaintiff had no title, is there any doubt but that the defendant might demur?] None; and a plea merely introduces a fact which the plaintiff has either purposely omitted or misrepresented.

The plea is not multifarious, the point raised is simply that of heirship, or, in other words, whether Ellice had a brother James, and the consequent destruction of the other links of the pedigree; the descent and seisin are the mere consequences of that single fact.

The payments stated in the bill are evidence of tenancy, and not

[1] 2 Sim & Stu. 274. [2] 5 Sim. 640. [3] 6 Madd. 61
[4] 8 Bligh, 63. [5] 1 Cox, 197. [6] 5 Madd. 428; 1 Russ. 158.

of heirship, and it is not therefore necessary that they should be answered.

The MASTER OF THE ROLLS. This is a bill of discovery, in which the plaintiff alleges himself to be heir-at-law of Sir Andrew Chadwick. It is filed against the defendants, who are alleged to be in possession of certain property which formerly belonged to Sir Andrew Chadwick, who is said in his lifetime to have demised it for a term of sixty years, which expired about the year 1825. The plaintiff claims as heir-at-law, in which character he alleges he is entitled to recover, and he has filed this bill for a discovery of those matters which are to enable him to establish his right at law.

The defendant has put in a plea and answer. I need not say, what is unfortunately too well known in the experience of every one, that, from the strictness of the technical rules of pleading, this is a mode of defence which can with the utmost difficulty be sustained; but it is not necessary for me now to enter into the reasons which gave rise to those rules, or the reasons which may perhaps be urged for their alteration. I must take them as they are, and endeavor to decide on them accordingly.

I have heard quite enough to show me that every care and attention has been used to make a short defence to this bill; its success, however, must depend on the nature of the allegations contained in the bill, and on the form and substance of the plea. The bill alleges that on the death of Sir Andrew Chadwick, the lessor, under whom the plaintiff claims, the premises which are described therein descended to the plaintiff's grandfather, Joseph Chadwick, who was the heir-at-law of Sir Andrew Chadwick, which said Joseph was the eldest son of James, who was the eldest brother of Ellice, who was the father of Sir Andrew.

It then alleges that James died in the lifetime of Sir Andrew; that Joseph, who was the grandfather of the plaintiff, became well seised and entitled to those premises; that Joseph died intestate; that the premises then descended to the plaintiff's father, Thomas, and that thereby Thomas became well seised; and then it alleges that the premises descended to the plaintiff from Thomas. So what is here alleged is that there was an heirship and descent, and that there was a seisin in consequence of the heirship and descent. Now, upon this occasion, I do not think it at all necessary to consider a question which has not been argued as carefully as it would have been had it been material, namely, as to the validity of a plea of this sort to a mere bill of discovery. I mean to express no opinion whatever on that subject. I will assume that a negative plea may be a valid plea to a bill of discovery. Now the plea which has been put in is certainly very singular in

its form; it is alleged to be a mere negative plea of not heir, and to amount shortly to this: "You, the plaintiff claiming the property as heir, are not heir, and therefore there is an end of your title." That is alleged to be the sum and substance of the plea; but the plea is really to this effect, that the plaintiff's grandfather was not the heir of Sir Andrew, and that the plaintiff is not the heir of Sir Andrew. The plea then goes on to assert that the premises did not descend to Joseph, who was the grandfather, as the heir of Sir Andrew; it further proceeds, neither did they descend to Thomas as the heir of Joseph, neither did they descend to the plaintiff as the heir of Thomas. It further goes on, that Joseph, the grandfather, did not become seised as the heir of Sir Andrew, nor did Thomas become seised as the heir of Joseph, nor did the plaintiff become seised either as the heir of Thomas, his father, or as the heir of Joseph, his grandfather, or as the heir of Sir Andrew, who was the lessor under whom he claims. Now I take it to be quite clear that the fact of a party being heir is consistent with the fact of there being no descent, and that under certain circumstances there may have been a descent without a seisin. These things, therefore, are several matters; they are not all the same; and consequently this is not a single plea of not heir, but it is a plea of not heir with those several other circumstances annexed, not heir, no descent, and no seisin. The plea ends with a reason, "for that Ellice, who was father of Sir Andrew, had no elder brother named James, or any brother named James who had left issue; and Joseph, the grandfather, was not the son of any James who was the brother of Ellice, the father of Sir Andrew."

It has been very ingeniously argued that the plea really amounts to this, that the plaintiff is not descended from any James through whom the descent from Sir Andrew could be traced. If that point had been brought forward on the plea, or if a single fact had been brought forward which, by destroying the general links of succession in the pedigree, had in that way disproved the plaintiff's title; or if the general result had been a simple statement of "no heir," I should have been inclined to think that, subject to any other objection raised, the plea would have been good, and ought to have been allowed, but it does not appear to me that a plea in the present form is a good plea. It pleads matters which appear to me to be distinct and several, and which, as would be seen at once if this were a bill for relief, would have a totally different effect. Suppose this had been a bill for relief, and no heirship had been pleaded, the plaintiff might have replied to the plea; and if it had been proved that the plaintiff was the heir, then the other facts, the descent and the seisin, would have been admitted: this evidently shows that this is a plea of several matters.

It is further objected to this plea that it is informal, and that it does not accomplish that which is rarely, if ever, accomplished by the union of a plea and answer, in consequence of objections arising from the several rules of pleading. The rules have been agreed upon by both sides, the difficulty is in acting on them in each particular case. They may be stated thus: you are to answer every thing charged in the bill, which, if true, would displace the plea; and this you must do whether the bill does or does not expressly charge those matters to be evidence of the facts. If they are material for the purpose of displacing the plea, they are to be answered; but, on the other hand, if they are not material for that purpose, you are not to answer them, for by so doing you overrule your plea. Now in this case it is said that the defendant has either done too much or too little; there are certain receipts and acknowledgments for rent, which are stated in the bill to have been in the possession of the defendant, and to be evidence of the matters charged in the bill or some of them; there are also statements in the bill of the payments of rent, for which these are the receipts and the acknowledgments. The defendant has answered as to the receipts and acknowledgments, but he has not answered as to the payment of rent. Now it is said he has either answered too much or too little; for if he was bound to answer as to the receipts and acknowledgments, then he has done too little, because he has not answered as to the payments. On the other hand, if he was not bound to answer as to the payments, then he has done too much, because in that case he ought not to have answered as to the receipts and acknowledgments.

Now the distinction which has been drawn by Mr. Girdlestone on that point is to this effect: he says this is not a payment which you may apply to any thing stated in the bill, but a payment alleged in the bill as evidence of tenancy and not of heirship. I think he is mistaken as to that, and that it is stated as evidence of the plaintiff's title, which consists in his heirship and nothing else; and it appears to me, therefore, even on this point of form, if the defendants got over the other difficulties, that this plea would have to be overruled.[1]

[1] This case has been materially modified for the purpose of excluding irrelevant matter. — Ed.

HUNT v. PENRICE.

BEFORE SIR JOHN ROMILLY, M. R. NOVEMBER 4 AND 5, AND DECEMBER 2, 1853.

[*Reported in* 17 *Beavan*, 525.]

SOME property was bequeathed in trust for Constantia Gosling for life, with remainder to her children, and in default to the plaintiff, Mrs. Hunt and others.

According to the statements in the bill, Constantia Gosling married, first, Alexander Campbell, and secondly, John Corley, and she died in 1851, "without ever having had any issue." The plaintiff having applied to the trustees to pay over the money, they refused, alleging that the defendant, Alexander Francis Campbell, claimed it "as being the only child of Constantia."

The bill charged that Constantia never had any issue, and that the defendant, Alexander Francis Campbell, was not her child, but the child of some other woman, and adopted by her. The bill also alleged as follows:—

29. That Constantia Campbell, during the time she was the wife of Alexander Campbell, continually corresponded with her brother and sisters and other members of her family, yet she never in any manner in the course of such correspondence stated that she was, or in any manner alluded to her being pregnant or delivered of any child, or alluded to Alexander Francis Campbell otherwise than as her adopted child.

30. That Alexander Campbell made his will in May, 1819, and thereby disposed of considerable property, yet he made no devise, bequest, or disposition of any property to or in favor of Alexander Francis Campbell, or ever in any manner referred to him, and never in any manner referred to his having any son.

31. That Alexander Francis Campbell was never treated, known, or reputed by the said Alexander Campbell or any of his family, relations, or friends, as the son of Alexander Campbell by Constantia Gosling, and he was never treated or recognized by any of the family or relatives of Constantia Gosling (afterwards Campbell) as her son, or otherwise than as her adopted son.

The plaintiff interrogated the defendant as to these statements in the usual form.

To this bill the defendant, Alexander Francis Campbell, pleaded that Constantia Campbell, improperly called Constantia Corley, left issue at the time of her death one child, viz., the defendant, Alexander Francis Campbell, who had attained twenty-one years; that Constantia Campbell was delivered on the 26th of January, 1813, at Bridge House, Colchester, of a son, who was the defendant, Alexander Francis Campbell, and she was then the wife of Alexander Campbell, and that he was baptized on the following day by a Roman Catholic priest as the son of the said Alexander Campbell and Constantia his wife. The defendant then averred that Constantia left at her death a child, viz., the defendant. No answer accompanied this plea.

The plea now came on for argument as to its sufficiency.

Mr. *Roupell* and Mr. *Piggott*, in support of the plea. The only point really in contest between the parties is whether the defendant is the son of Constantia, and this is properly put in issue by a negative plea. The defendant must give every discovery which can support the plaintiff's case, but he is not bound to set out his own title, or the evidence in support of it, or to give discovery which will destroy and not assist the plaintiff's case. The *onus* of proving the truth of the plea lies on the defendant, and if he should be able to do so to the satisfaction of the court, the plaintiff's case will be at an end. The plaintiff requires no evidence or discovery, for the defendant is bound to prove the assertions contained in his plea, viz., that he is the son of Constantia. They referred to Jones *v.* Davis;[1] Thew *v.* Lord Stafford.[2]

Mr. *R. Palmer* and Mr. *Southgate*, for the plaintiff, contra. This plea is informal; it wants the necessary averments and answer to support it. The rule is, that a plea which negatives the plaintiff's title, though it protects a defendant generally from answer and discovery as to the subject of the suit, does not protect him from answer and discovery as to such matters as are specially charged as evidence of the plaintiff's title. Sanders *v.* King;[3] Crow *v.* Tyrell;[4] Emerson *v.* Harland.[5] The rule is stated by Lord Langdale thus: "You are to answer every thing charged in the bill which, if true, would displace the plea, and this you must do whether the bill does or does not expressly charge those matters to be evidence of the facts." Chadwick *v.* Broadwood.[6] The rule is also stated by Lord Cottenham still more distinctly. He says: "You cannot plead the negative of the fact without denying those allegations in the bill which have a tendency to prove that fact." Denys *v.* Locock.[7]

[1] 16 Ves. 262. [2] V. C. Stuart, unreported. [3] 6 Madd. 65.
[4] 2 Madd. 409. [5] 3 Sim. 490; 8 Bligh, 62. [6] 3 Beav. 540.
[7] 3 Myl. & Cr. 231.

A plaintiff is entitled to a discovery of that which will repel the case set up by the defendant (Attorney-General v. Corporation of London),[1] as well as of that which he avers will establish his own title. Stainton v. Chadwick.[2] All the facts which are alleged in the 29th, 30th, and 31st paragraphs, if proved, would be evidence to go to a jury on the issue of fact raised by the plea. The plaintiff is therefore entitled to a discovery of them, in order that they may be brought before the court at the hearing of this cause. Again, the defendant may have in his possession documents which will clearly establish the plaintiff's case.

They also cited Wigram on Discovery;[3] Redesdale.[4]

Mr. *Roupell*, in reply, cited Ord v. Huddleston.[5]

The MASTER OF THE ROLLS. I wish to look at the authorities; but evidently the contest is useless to both parties, for the plaintiff cannot expect much information from the answer, nor can the defendant be much inconvenienced from disclosing his title. Although it may not be productive of benefit to either party, yet it may be of importance as regards the course of proceeding in this court.

December 2.

The MASTER OF THE ROLLS. This is a plea put in to a bill filed by the plaintiffs, claiming to share in a considerable sum of money in the funds, in the names of trustees, to which the plaintiff, Thomas Hunt, in right of the co-plaintiff his wife, would be entitled, together with several of the defendants, under the trusts of the will of the testator Francis Gosling, in case the daughter of the testator, Constantia Gosling, died without issue.

The bill alleges that Constantia Gosling married Mr. Campbell, and died without issue in the month of January, 1851.

The plea avers that the defendant, Alexander Francis Campbell, is the son and only child of the said Constantia Campbell; and the question is, whether the plea ought not to have been supported by an answer to certain statements contained in the bill to which the defendant is interrogated, and which, if admitted, might tend to invalidate the plea. These statements of the bill are contained in paragraphs 29, 30, and 31, and they are to this effect. [His Honor read them.]

It is manifest that this plea raises the only issue between the plaintiffs and the defendant; and it is also plain that these statements to which the defendant is interrogated are of such a nature that, even if true, he is not likely to have any knowledge of them, — at least of those contained in paragraphs 29 and 31, — and that the statement contained in paragraph 30 is a fact which, if at all, can be proved by the

[1] 2 Mac. & Gor. 247. [2] 8 Mac. & Gor. 575; 18 Beav. 320.
[3] Sect. 102. [4] Page 244, 4th ed. [5] 2 Dick. 510.

production of the probate or of an attested copy of the will of Alexander Campbell: and it requires little experience in this court to see that if an answer is compelled to be put in by the defendants to the allegation, the answer will in all probability be of little benefit to the plaintiffs. This was so manifest to me during the argument, that I certainly felt desirous to allow this plea, provided I could do so consistently with the settled rules of pleading in this court; and I reserved my judgment in consequence, in order to look through the authorities, and consider the distinctions which exist in the books on this subject. The result, however, has been, that I have come to the conclusion that I cannot, consistently with these settled rules, allow this plea.

The rule has, I think, been correctly stated at the bar to this effect: that where the bill alleges facts which, if true, would contradict or be evidence to discredit the plea, the plea must be supported by an answer, if not denying, at least giving the plaintiff discovery as to these facts. I am unable, as I was at first disposed to do, to draw any distinction between the greater and less degree of materiality of these facts, assuming them to be to some extent material. If it be true, as it undoubtedly is, that the statement of a fact which, if true, would be inconsistent with the truth of the plea must be answered, it follows that the statement of every fact which would, as far as it goes, be evidence against the truth of the plea must also be answered; for this court would in vain attempt to draw any line of distinction that would be intelligible as to the weight to be attributed to different classes of such facts, assuming them to be proved or to be admitted by the answer; such, for instance, as to lay down a rule that the discovery must be given where the fact stated, if true, would absolutely disprove the fact pleaded, from the impossibility of both being true, and that such discovery need not be given when the fact alleged was such that, if true, it created only a very high degree of improbability that the fact pleaded and the facts alleged could both be true.

The rule, as stated by Lord Eldon in Jones v. Davis,[1] that the defendant must answer as to facts which would be evidence before a jury to disprove the plea, is a plain and intelligible rule, and one that I consider myself bound by. The facts alleged in these three paragraphs are such as if proved or admitted might influence a jury or the court in coming to a conclusion on the truth or falsity of the fact pleaded; and I am therefore of opinion that they should have been answered, and that the plea is bad, by reason of its containing no such answer to them.

I shall therefore in this case direct the plea to stand for an answer, with liberty to the plaintiff to except; but, under the circumstances of this case, I shall direct the costs of the plea to be costs in the cause.

[1] 16 Ves. 262.

YOUNG v. WHITE.

BEFORE SIR JOHN ROMILLY, M. R. NOVEMBER 19 AND 21, AND DECEMBER 2, 1853.

[*Reported in* 17 *Beavan*, 532.]

THE plaintiffs were entitled to a patent, dated the 17th of October, 1850, for obtaining paraffine oil and paraffine from bituminous coal. They alleged that the defendants had pirated their invention, and sought an injunction and the account usual in such cases.

The defendants put in a plea and answer, the plea asserting that the plaintiff, James Young, "was not the true and first inventor" of the process specified in the patent. They coupled this plea with an answer to those parts of the bill which they considered not to be covered by the plea. The passages in the bill which the plaintiffs alleged ought to have been answered were the paragraphs numbered as follows: 4 and 5, which contained a statement of the accuracy of the specification of the letters-patent that James Young was the first and true inventor. 6. That he assigned these letters-patent to the other plaintiffs. 7. That they had laid out large sums of money in erecting works for working the patent, and had used the invention. 8. That the letters-patent for the invention had been granted to James Young for Scotland and Ireland.

The 10th, 11th, 12th, and 13th paragraphs were to this effect: 10. That the "Times" newspaper, on the 6th of September, 1850, stated that Mr. Young was the inventor of this process, and that the invention was one of great value. 11. That a prize medal had been awarded by the jurors of the Great Exhibition to James Young for his invention. 12. That in the report of the jurors he was stated to have been the inventor of this process, one of great value, which realized a problem which Baron Liebig stated to be one of the great *desiderata* in chemical science. 13. That the statements so contained in these paragraphs were true. 14. That Dr. Playfair had expressed an opinion in favor of Young being the inventor. Subsequent paragraphs alleged that the defendants were using the process discovered by Young, and the interrogatories contained searching and minute inquiries as to the process used by the defendants.

The plea now came on for argument.

Mr. *Daniel* and Mr. *Little*, in support of the plea. The plea properly reduces the litigation to this single point, — was Young the first inventor, that is, is the patent valid or not? The answer which accompanies the plea furnishes a full discovery to all the matters tending to prove the plaintiffs' case. As to the rest, it is a mere fishing attempt to ascertain the defendants' trade secrets. They cited Stead *v.* Williams;[1] 36, 37, and 38 Orders of 26th August, 1841;[2] 15 & 16 Vict. c. 83; Hindmarch on Patents.[3]

Mr. *R. Palmer* and Mr. *Giffard*, contra. The plea is insufficient, not being accompanied by an answer to the several interrogatories relating to matters which, if answered, might tend to prove the plaintiffs' case and disprove the defendants'. They cited Swinborne *v.* Nelson;[4] Emerson *v.* Harland;[5] Jones *v.* Davis;[6] Denys *v.* Locock;[7] Allen *v.* M'Pherson.[8]

Mr. *Little*, in reply.

The MASTER OF THE ROLLS reserved his judgment.

December 2.

The MASTER OF THE ROLLS. In this case there arises a question closely analogous to that which occurs in the case I have just decided,[9] and therefore I shall not repeat here the principles which, as I conceive, govern these cases, but consider solely their application to the one now before me.

The plaintiffs are the patentees and the assignees of the patentee of a patent for obtaining paraffine oil and paraffine from bituminous coal. They allege that the defendants have pirated their invention, and they seek an injunction and the account usual in such cases.

The defendants have pleaded that the plaintiff James Young is not the first and true inventor of the process specified in this patent. They have coupled this plea with an answer to such parts of the bill as they consider not to be covered by the plea.

The great difficulty which formerly resulted in such cases, from the circumstance that the bill usually contained statements which, although covered by the plea in part, were also in part such as the defendant was bound to answer, has been removed by the orders of the court,[10] which direct that a plea is not to be overruled because the defendant has submitted to answer a part of the bill covered by the plea.

This order, however, leaves untouched the rules which compel the defendant to answer all such parts of the bill as contain statements of

[1] 7 Man. & Gr. 818. [2] Ord. Can. 175. [3] Page 448.
[4] 16 Beav. 416. [5] 8 Sim. 490; 8 Bligh, 62. [6] 16 Ves. 262.
[7] 8 Myl. & Cr. 205. [8] 5 Beav. 469; 1 Phill. 142; 1 H. Lds. Cas. 191.
[9] Hunt *v.* Penrice, 17 Beav. 525. [10] Ord. Can. 175.

facts which, if true, would be evidence to disprove the fact pleaded. This the plaintiffs allege the defendants have failed in doing, and they point out various passages in the bill not answered, which they allege are of this description. I shall consider *seriatim* all the passages not answered by the answer accompanying the plea. The first of them are the paragraphs of the bill numbered from 4 to 8 inclusive; these contained a statement of the accuracy of the specification of the letters-patent that James Young was the first and true inventor, that he assigned these letters-patent to the other plaintiffs, and that they have laid out large sums of money in working the patent, and have used the invention since the date of the letters-patent, and have also obtained letters-patent for the invention for Scotland and Ireland. I think that all these facts are properly covered by the plea, and that these paragraphs do not contain facts which would be evidence before a jury to discredit the plea. It is true that the granting of letters-patent may, if undisputed, be *prima facie* evidence that the patentee is the first and true inventor, but this is nothing more than the title of the plaintiff to call upon the defendant to defend his use of that invention, and would not, I think, at a trial at law, be submitted to the jury by the judge, or even insisted upon by the counsel of the patentee, as furnishing any evidence to lead the jury to the conclusion that the patentee was the first inventor. The only effect of it is, I conceive, to throw the burden of proof on the defendants, and this they undertake to do by their plea.

The next paragraphs not answered are the 10th, 11th, 12th, and 13th. These are to this effect: that the "Times" newspaper stated that Mr. Young was the inventor of this process, and the invention was one of great value; that a prize medal was awarded by the jurors of the Great Exhibition to James Young for his invention, and that in the report of the jurors he is stated to have been the inventor of this process; that it is one of great value, and that it realizes a problem which Baron Liebig stated to be one of the great *desiderata* in chemical science. And the bill further alleges that the statements so contained in these paragraphs are true.

According to the best judgment I am able to form, the facts alleged in these paragraphs would not be evidence to go before a jury summoned to determine the question whether James Young was the first and true inventor. In the first place, they do not in strictness express any opinion as to the question whether the invention had been discovered before Mr. Young discovered it; they do, however, express an opinion that Mr. Young was the inventor, and that invention was very valuable; but even if the point at issue had been expressly asserted by them, as it has been, according to the statement contained in the next paragraph of the bill, by Dr. Lyon Playfair, I still think that it would

not be evidence before a jury. I am of opinion that though the persons who express their opinion might be called as witnesses and examined as to the fact that Mr. Young was the first and true inventor, their opinions, whether written or oral, that he was such could not be given in evidence before a jury without producing the person who had given that opinion, in order that the jury might have the best evidence before them, and thus have the opportunity of ascertaining the means of knowledge of the person expressing this opinion, and of testing the value of it.

The delivery of the medal appears to me to be simply a proof of the deliberate opinion of the jurors, and to be entitled to stand in no higher degree than the expression of that opinion. The allegations in the bill that the opinions so expressed by these persons were and are true, is nothing more than an allegation that James Young was the first and true inventor, and this is covered by the plea.

The same observations apply to paragraph 14, which states a lecture given by Dr. Lyon Playfair, in which he expressed his opinion that Mr. Young was the first and true inventor of this process.

The remaining passages of the bill which are not answered are the latter portion of the 15th paragraph, the 16th, and the first part of the 17th, and from the 18th to the 23d paragraphs, both inclusive. These paragraphs contain allegations that the defendants are in fact using the process discovered by Mr. Young, and they set forth the communications between the solicitors of each party, one of which, from the defendants' solicitor, contains an allegation that the process used by them is wholly different from that specified in this patent.

I am of opinion that the facts stated in these paragraphs are not such as could be laid before a jury on the simple question of whether James Young was the first and true inventor. The fact that another person is now using the process patented is no evidence to show that the patentee was or was not the first and true inventor; and my opinion is that the whole of these paragraphs are covered by the plea, and do not require that any answer should be given to them for the purpose of supporting the plea.

Without going through in detail the answer given to the paragraphs of the bill numbered from 24 to 27, inclusive, and which answer is to be found in paragraphs 37 to 47, both inclusive of the answer, I am of opinion that the answer sufficiently answers all such portions of this part of the bill as could be made use of in evidence to negative the plea, and the rest of the bill is answered. No point is made that the defendants have not with sufficient clearness pointed out to what portion of the bill they have pleaded, and what portion of it they have answered, and the result is that I think the plea is sufficient, and that it ought to be allowed.

MANSELL v. FEENEY.

BEFORE SIR WILLIAM PAGE WOOD, V. C. APRIL 18 AND 19, 1861.

[*Reported in* 2 *Johnson & Hemming*, 818.]

THE plaintiff alleged that by an agreement made in April, 1844, and an option exercised thereunder by plaintiff in March, 1847, plaintiff became a partner with the defendant in a newspaper business, and prayed that proper articles should be settled, and for an account of profits. The bill did not contain a charge of books and papers, but there was an interrogatory as to documents.

The defendant's case was that the plaintiff had merely advanced money on loan, and he put in a plea denying that there was any partnership, together with an answer in which he also took the defences of laches and the Statute of Limitations. The defendant by the answer also stated that he had made an affidavit setting forth a schedule of documents relating to the matter in the bill mentioned, and save as appeared thereby he had no documents relating to the matters in question in the suit.

This affidavit, filed on the 17th of December, 1860, admitted the possession of relevant documents set forth in the 1st and 2d parts of the schedule thereunto annexed, and proceeded as follows: "I further say that I object to produce the documents in the 2d part of the said schedule contained, inasmuch as the same relate only to the purchase by the defendant of the said newspaper, and to the profit and loss in carrying on the same. And I further say that I am not and never was a partner with the plaintiff in the purchase of the said newspaper, or in the business of carrying on the same; and that the plaintiff has not and never had any interest whatever in the documents in the said 2d part of the said schedule;" and further denied the possession of any relevant documents other than the documents in the 1st and 2d parts of the said schedule.

The answer also admitted a correspondence set out in the bill, in which the plaintiff had spoken of the business as a joint concern, without eliciting from the defendant any immediate denial of the existence

of a partnership, though at a subsequent stage of the correspondence the partnership was distinctly denied.

Mr. *Rolt*, Q. C., and Mr. *Speed*, for the plea. We deny the partnership; and this is a sufficient bar to all discovery as to the profits and losses of the business, and to the prayer for partnership accounts. As to any supposed liability in respect of the advances of the plaintiff, we have answered.

Sir *H. Cairns*, Q. C., and Mr. *W. P. Murray*, for the plaintiff. The plea is bad both in substance and form. In all cases of a negative plea of no partnership or the like, there must be an answer giving full discovery as to all facts tending to rebut the plea. Jones *v.* Davis;[1] Evans *v.* Harris;[2] Harris *v.* Harris;[3] Denys *v.* Locock;[4] Attorney-General *v.* Corporation of London.[5]

The plea is also bad for duplicity. Emmott *v.* Mitchell;[6] Cooth *v.* Jackson;[7] Beames on Pleas.[8]

This plea is, therefore, bad in substance for not giving the proper discovery, and in form for duplicity, and also because a defendant answering must answer fully. Some reliance may be placed on the absence of the charge of books and papers; but it is decided that that is not necessary under the new practice as a foundation for an interrogatory on the subject. The defendant was, therefore, as much bound to answer this interrogatory as he could have been under the old practice to answer that part of the bill which contained the charge of books and papers; and it cannot be pretended that a full answer has been given. Perry *v.* Turpin.[9]

Mr. *Speed*, in reply. The real issue is partnership or no partnership, and it is admitted that this may be tried upon the plea.

We say that we have answered fully all the charges in the bill; and however the new practice may have dispensed with the necessity of this charge for ordinary purposes, it has not extended the old rule as to answering, which was merely that a defendant answering must answer fully all the charges in the bill. Daniell's Practice;[10] Sanders *v.* King;[11] Thring *v.* Edgar.[12] In the case of a plea and answer it is not necessary to answer any thing except what is expressly charged in the bill as evidence of the fact put in issue by the plea.

The 37th Order of August, 1841,[13] removes the difficulty that formerly arose from the rule that a plea might be overruled by answering too much or too little.

[1] 16 Ves. 262. [2] 2 Ves. & Bea. 361. [3] 8 Hare, 450.
[4] 8 My. & Cr. 205. [5] 2 M. & G. 247. [6] 9 Jur. 171.
[7] 6 Ves. 12. [8] Page 89. [9] Kay, App. 49.
[10] 2d ed. 574. [11] 6 Madd. 61. [12] 2 Sim. & Stu. 274.
[13] Consolidated Orders, xiv. 9.

We have fully answered the bill, and it is not necessary, for the purpose of sustaining the plea, to answer the interrogatories where they go beyond the charges of the bill. As to the objection for duplicity, I admit that the answer raises the defence of delay and acquiescence, which would have overruled the plea before the Order of August, 1841; but it is not so now, and the only question as to duplicity is, whether the plea tenders a single issue, and this our plea does, — the issue of partnership or no partnership. In Emmott *v.* Mitchell there was the same kind of duplicity, the defences being the Statute of Limitations and non-liability on the original facts; but this objection did not prevail.

Vice-Chancellor Sir W. Page Wood. The question in substance is, whether the defendant is bound to produce the accounts and books required by the bill. The plea is put in for the purpose of avoiding the production of the alleged partnership accounts. It would no doubt be a great hardship for the defendant to be compelled to put in accounts which had no tendency to prove the issues raised in the suit. In cases of this kind I have always endeavored to draw a line between accounts which are necessary for the decision of questions which may occur at the hearing, and those which could in no event be required until the decree came to be worked out, and could have no bearing on the issue in the cause.

Lord Cottenham laid it down that a plaintiff filing a bill alleging himself to be a creditor of a testator has no interest in seeing the testator's title-deeds before the hearing, and that the court will struggle to prevent any needless exposure of the defendant's affairs. But this plea is very inconvenient in point of form, even if it were saved in this respect, as I do not think it is, by the order which directs "that no demurrer or plea shall be held bad and overruled on argument only because the answer of the defendant extends to some part of the same matter as is covered by such demurrer or plea." That order was intended to prevent the failure of justice from accidental slips which constantly happened by reason of some slight part of the same ground being covered both by a plea and answer, but it was not designed to enable a defendant to take by a plea and answer two substantially distinct defences. This plea goes to the whole bill, and it is accompanied by an answer which sets up two defences, each of which is also an answer to the whole bill. There are, therefore, three defences to the whole record, — one taken by the plea and two by the answer.

It is urged that if issue is taken on the plea, the case will be decided, and the plaintiff, if successful, will establish his right to the discovery he may require. Still I think this is not a case where the court should favor the setting up of three defences by a plea and answer. The plea would clearly have been bad under the practice before 1841, and I

do not think it is within either the words or the spirit of the order relied on.

Independently of the defect in form, there is a substantial objection to the plea, the validity of which, however, depends upon the new practice of the court. Under the old practice a bill always contained a charge of the possession of books and papers from which the truth of the allegations of the bill would appear, or, as it was sometimes put, relating to the matters contained in the bill. If there had been such a charge in the bill in this case it would have been necessary, according to Harris *v.* Harris, for the plea and answer to negative the charge. The answer in that case did affect to negative the charge so far that it admitted the possession of books and papers relating to the said business, which the defendant submitted he was not bound to produce, and, excepting these, he said he had not any documents by which the truth of the alleged matters would appear; and on this Vice-Chancellor Wigram observed that the defendant did not deny that the truth would appear upon the documents in his possession, and therefore, for the purpose of the argument, admitted it. On that ground the plea was overruled.

In the present case the bill does not contain the charge of books and papers, it being the settled practice of the courts, since the act of Parliament which requires the bill to contain only statements of fact, to regard charges of the evidence relied on as unnecessary except when they are required to point to particular evidence, as in the case of admissions and the like. Upon the statement of facts contained in the bill interrogatories are exhibited, and the court has not been very precise in limiting the extent of them; and I have myself held that the charge of books and papers is not necessary to give a right to interrogate as to the point, the act pointing out that it was desirable to omit from the bill all extrinsic matters not constituting facts in the cause.

This course was followed by the plaintiff in this case. Interrogatories were filed asking for books and papers relating to the subject-matter of the suit. The whole matter in dispute was the alleged partnership; and the answer of the defendant is only this, that he has made an affidavit to the effect that, except certain documents therein mentioned, he has no documents relating to the matters in question. That refers me to the affidavit as part of the answer, and I am bound to look at it, and there I find that the defendant admits the possession of a quantity of books and papers which he declines to produce, and the answer is therefore in effect that he has relevant documents which he refuses to produce. The form used here is not "whereby the truth will appear," but the case is otherwise as near to Harris *v.* Harris as can be conceived; and what strikes me especially is, that the defendant con-

fesses some particular documents which go far to support the alleged partnership. A correspondence is mentioned in the plaintiff's bill, and this is admitted; and I find that it contains one letter in which the plaintiff makes a clear assertion that the newspaper was a joint concern, the reply to which does not deny that this was the case. The plaintiff says that a certain course will damage "the joint concern;" to which the answer is not a denial of the joint interest, but that it was a question of convenience. Subsequently, it is true, the dispute arose, and the partnership was denied.

What I have before me, therefore, is a plea and answer to the relief, and also to the discovery sought, which in terms denies the partnership, and which admits the possession of other relevant documents than those mentioned in the bill, but declines to produce them. Under these circumstances, I apprehend the defendant cannot escape discovery of these documents, which are treated in the interrogatories as having an important bearing on the question in issue, and are admitted by the answer to relate thereto.

The defendant says he pleads "no partnership" in bar to the whole relief and discovery, and I am asked to hold that by the answer he has given he has satisfied the rule of supporting by answer the negative defence raised by the plea, he having admitted documents which he does not deny to be relevant, and having further set out particular documents which afford strong evidence in favor of the plaintiff's contention.

Further than that, the answer sets up two additional defences, — laches and the Statute of Limitations, — which may possibly be good, but ought not to be combined with this plea.

This appears to me to be simply an attempt to evade the very discovery which is the most likely thing possible to lead to the proof of the partnership which the plaintiff seeks to establish, and which the plea denies. The plea must stand for an answer, the defendant paying the costs, and the plaintiff having a week to except.

WILSON v. HAMMONDS.

BEFORE SIR WILLIAM M. JAMES, V. C. MAY 22 AND 24, 1869.

[*Reported in Law Reports*, 8 *Equity*, 323.]

THIS bill was filed by William Francis Lucan Doyle Le Hunte Wilson, an infant, by Archibald Maclean, his next friend, against Peregrine Hammonds, Gilbert Ainslie Young, William Langham Hazlerigge Le Hunte Wilson, and Barbara Catherine, his wife, John Elphingstone Fleming Wilson, William Henry Bowen Jordan Wilson, and John Richard Sheppard Wilson.

The bill stated an indenture of settlement dated the 16th of November, 1855, and made between the defendant William Henry B. J. Wilson, of Jordanstown, in the county of Pembroke, Esquire, of the first part, the defendant William Langham H. L. Wilson (eldest son of the last-named defendant) of the second part, Louisa Wilson (since deceased, then the wife of William Henry B. J. Wilson) of the third part, and William Smith Sewell Doyle (since deceased) and George Herbert Kinderley (since deceased) of the fourth part, whereby certain messuages, lands, and hereditaments in Pembrokeshire and Caermarthenshire were granted, limited, and appointed to the use of William Langham H. L. Wilson and his assigns for life, without impeachment of waste, with remainder to his first and other sons in tail male; and in default of such issue to the use of the defendant John Elphingstone F. Wilson for life, with remainder as before; and in default of such issue, to the use of the trustees for a term of years upon trust to raise portions for daughters of William Henry B. J. Wilson, and from and after the expiration or sooner determination of the said term, to the use of William Henry B. J. Wilson for life, remainder to the use of the defendant John Richard S. Wilson (a brother of William Henry B. J. Wilson) for life, with remainder to his first and other sons in tail male; with remainders over; and an ultimate remainder to the right heirs of William Langham H. L. Wilson. The deed conferred a power upon (amongst others) William Langham H. L. Wilson of jointuring a wife to the amount of £200 a year.

The bill, filed the 9th of March, 1869, stated as follows:

2. "On or about the 12th day of January, 1858, the said defendant

William Langham H. L. Wilson, who was then a bachelor, intermarried with the defendant Barbara Catherine Wilson, by whom he had had one son only, namely, the plaintiff, William Francis L. D. L. Wilson, who was born on the 12th day of July, 1860; and the plaintiff is the first and only son of the said William Langham H. L. Wilson, and as such is entitled to the said trust and settled property as tenant in tail male in remainder" . . .

The bill then stated an indenture, dated the 24th of January, 1859, and made between the defendant William Langham H. L. Wilson of the first part, the defendant Barbara C. Wilson of the second part, and the defendant Peregrine Hammonds of the third part, whereby William Langham H. L. Wilson jointured "the said Barbara C. Wilson, his wife," in case she should survive him, to the amount of £200 a year; and (par. 5) another indenture, dated the 17th of October, 1860, and made between the defendant William Langham H. L. Wilson of the first part, the defendant Barbara C. Wilson, the wife of the said W. L. H. L. Wilson, of the second part, the said William Smith Sewell Doyle (since deceased) of the third part, and John Aloysius Blake of the fourth part, whereby, after reciting the above-mentioned indentures, "and" (as the bill stated) "that there was at present one child only of the said marriage of the said W. L. H. L. Wilson and Barbara C. Wilson, his wife, meaning the above-named defendant," W. L. H. L. Wilson charged the lands with an annuity of £500 for the separate use of Barbara C. Wilson "during the joint lives of herself and her said husband, W. L. H. L. Wilson."

The bill stated that in December, 1867, the defendants Hammonds and Young became trustees of the settlement of 1855, and alleged as follows:—

10. "The plaintiff, as the first and only son of the said William Langham Hazlerigge Le Hunte Wilson, is entitled, subject as aforesaid, to the said settled or trust property as first tenant in tail male in remainder expectant on the decease of his said father, William Langham Hazlerigge Le Hunte Wilson."

12. "The defendants, other than the said Barbara Catherine Wilson, however, dispute the title of the plaintiff, and pretend that he has no estate, right, title, or interest in or to the said settled or trust property, or any part thereof; and in particular the defendant John Elphingstone Fleming Wilson claims to be entitled to the rents and profits and annual income of the said trust property in remainder immediately expectant on the death of the defendant William Langham Hazlerigge Le Hunte Wilson; and the defendants William Henry Bowen Jordan Wilson and John Richard Sheppard Wilson respectively claim to be entitled to successive life-estates in the said trust property immediately expectant on the determination of the life-estate of the said

defendants William Langham Hazlerigge Le Hunte Wilson and John Elphingstone Fleming Wilson respectively; but the said several defendants respectively refuse to discover the grounds on which such allegations or pretences and claims are made, and the plaintiff charges that they are wholly without foundation."

The bill then alleged that the defendants Hammonds and Young had sold the settled estates or parts thereof, and had received purchase-moneys to the amount of £52,000 and upwards; and charged that such sales were not beneficial to the plaintiff and the other persons entitled under the settlement, and ought not to have been made, and that the moneys ought to be reinvested in lands to be settled to the same uses.

The bill prayed that the trusts of the settlement might be carried into execution under the direction of the court; for an account of the proceeds of the sales; an injunction, receiver, and other relief.

Interrogatories were filed, amongst which were the following:—

2. "Did not the defendant William Langham H. L. Wilson, or who, and whether not being then a bachelor, or what, intermarry with and whether not become the husband of the defendant Barbara C. Wilson, or who . . . and is not she now his wife? and did not the said defendant W. L. H. L. Wilson, or who, and whether not by the said defendant Barbara C. Wilson, or by whom, have one son, and whether any other, and who, and whether not the plaintiff; and whether not William Francis L. D. L. Wilson, or what was and is his name?" . . . "Is not the plaintiff the first, and whether not the only, son of the said W. L. H. L. Wilson, or of whom and by whom, or who is, and whether is he, or who, not, and whether not as such entitled, or how entitled, to or interested in the trust property?" . . .

5. "Was not such indenture as is stated in the fifth paragraph of the bill executed . . . and whether not of such purport or effect as therein mentioned?"

10. "Is not the plaintiff, or who, and whether not as the first and only son of the said W. L. H. L. Wilson, or who entitled . . . to the said settled estates . . . and whether not as the first or what tenant in tail in remainder . . . or in what way?" . . .

12. "Do not the defendants, or some and which, or one and which, of them (other than Barbara C. Wilson) dispute the title of the plaintiff, and whether not pretend or allege that he has no estate . . . in the said settled property . . . or what do they respectively allege or say in respect thereof? . . . What are the grounds on which such allegations or pretences and claims . . . are made? State the reasons and grounds on which the right or title of the plaintiff is disputed, and how, and in what manner it is attempted to be shown that he is not interested in the trust property, or entitled as in the bill mentioned, and what

facts, matters, circumstances, and evidence is there in support of such allegation or contention."

The defendant, William Langham H. L. Wilson, filed a plea to all the discovery and relief sought and prayed by the bill, and for plea said, "that the plaintiff is not the son of the defendant W. L. H. L. Wilson, as in the said bill alleged."

Mr. *C. Hall* and Mr. *Fischer*, for the plea. This is, no doubt, a negative plea, and a plea to the person of the plaintiff; but it is now settled that both such pleas are good pleas, as is shown by Lord Redesdale (Mitford on Pleading[1]), and by Earl Talbot *v.* Hope Scott;[2] Barrs *v.* Fewkes.[3]

No doubt, since the Orders of August, 1841, a plea is no longer held to be bad by reason of the defendant having answered, and his answer having extended to the same subject-matter as that which is covered by the plea; in other words, we might, in this case, have answered without fear of overruling our plea; but in order to try the validity of a plea, now as much as ever, the old law must be resorted to.

Then, are the facts stated in this bill averred in such a way as to entitle the plaintiff to have from the defendant an answer in support of the plea? With certain exceptions (such as the case of documents), what is stated in a bill must be stated in such a way as to show distinctly the particulars as to which the plaintiff desires to have discovery. If there be in the bill no allegations which, if true, would disprove the plea, no answer can be demanded. Smith's note to Lord Redesdale;[4] Drew *v.* Drew;[5] Thring *v.* Edgar.[6]

In this case, there being no statement in the bill which avers or in any way tends to show that any discovery is necessary for the purpose of establishing the plaintiff's case, the plea is perfectly good without any answer.

There are many cases in the books no doubt which establish the right to the production of documents where discovery as to documents is not expressly sought; but that is a separate class of cases.

[Daniell's Chancery Practice;[7] Winn *v.* Fletcher;[8] Jones *v.* Davis,[9] were also referred to.]

Mr. *Speed* and Mr. *T. A. Roberts*, for the bill. We do not say a negative plea may not be pleaded, but we say it must be accompanied by an answer.

Next, we say the plea must reduce the question to a single point. This plea is both equivocal and ambiguous.

No case has been adduced where a simple plea of "not heir" has

[1] 5th ed., by Jos. Smith, pp. 269, 270, and notes.
[2] 4 K. & J. 96, 136, 137.
[3] 2 H. & M. 60.
[4] Page 270.
[5] 2 Ves. & Bea. 159.
[6] 2 S. & S. 274.
[7] 4th ed. p. 555.
[8] 1 Vern. 478.
[9] 16 Ves. 262, 264.

been allowed. In all the cases where such a plea has been allowed, the plea has gone on to allege who is the apparent or presumptive heir. Mitford on Pleading;[1] Cooper's Equity Pleading,[2] referring to Gunn *v.* Prior.[3]

Our difficulty in this case is, that we do not know upon what ground the plea is sought to be maintained. Is the validity of the marriage in question? or the paternity of the defendant? or is it about to be contended that the plaintiff is a supposititious child? We do not know what sort of case we have to meet.

This bill states facts inconsistent with the plea. In particular it states a deed which recites that at the date of the deed (17th of October, 1860) there was one child only of the marriage of the defendants William Langham and Barbara Wilson. The plea should have been accompanied by a discovery of this deed. Emerson *v.* Harland;[4] Harris *v.* Harris;[5] Hunt *v.* Penrice.[6]

From Mansell *v.* Feeney[7] it results that the validity of a plea must depend upon the bill and interrogatories taken together, not upon the bill alone. Now the twelfth paragraph of the bill, and the interrogatory founded upon it, go to other defendants than this pleading defendant.

[Sanders *v.* King;[8] Perry *v.* Turpin;[9] Denys *v.* Locock;[10] Denys *v.* Shuckburgh;[11] and Earl Strathmore *v.* Countess of Strathmore,[12] were also cited.]

Mr. *Hall*, in reply.

The VICE-CHANCELLOR said he would not call for a reply on the question of the admissibility of a negative plea.

Mr. *Hall*. Then the only question is, whether we ought also to have answered.

The VICE-CHANCELLOR. The difficulty in your way is the averment (par. 5) of the deed containing the recital that there was in 1860 one child only of the marriage.

Mr. *Hall*. The bill does not allege that the plaintiff was that child. The averment was introduced merely as matter of title; and if the rule in Thring *v.* Edgar[13] be still law, it is unnecessary for a defendant who has denied the plaintiff's title by a negative plea to answer any of the facts, unless such an answer be specifically called for by the bill. Had this plaintiff, as in Hardman *v.* Ellames,[14] charged that the defend-

[1] 5th ed. p. 329. [2] Pages 249, 250.
[3] 2 Dick. 657; 1 Cox, 197; Forrest, Ex. Rep. 88, n.
[4] 3 Sim. 49; s. c. on appeal, 8 Bli. N. S. 62, 81.
[5] 3 Hare, 450. [6] 17 Beav. 525. [7] 2 J. & H. 318.
[8] 6 Madd. 61; 2 S. & S. 277. [9] Kay, App. xlix.; 18 Jur. 594.
[10] 3 My. & Cr. 205, 238. [11] 6 L. J. (Ch.) 330. [12] 2 Jac. & W. 541.
[13] 2 S. & S. 274. [14] 2 My. & K. 782.

ant had in his possession the deed of October, 1860, which would prove the fact of the plaintiff being the defendant's son, we might have been required to answer the charge, but he has not done so.

Sir W. M. James, V. C. In this case I am of opinion that the plea must be overruled.

I confess it seems to me rather unintelligible why the bill was so framed as to invite this plea. The case made was perfectly well known to the parties, and it seems very singular that the bill did not aver the facts as to which discovery was required.

Following the principle which was laid down by the Lord Chancellor in Mansell *v.* Feeney,[1] I think I must look at the bill and the interrogatories as forming one record. Looking, then, at the bill and interrogatories together, and treating the matter as one of substance and not of mere form, I consider it to be quite clear that certain facts were alleged in the bill, and were interrogated to, for the purpose of making out the issue that the plaintiff was, what the plea says he was not, the son of the defendant. It seems to me that the allegations which are made could only have been made with a view of obtaining discovery.

Again, the fifth paragraph of the bill must, I think, be read as if it had been preceded by a charge that the plaintiff was the person therein referred to as the only child of the marriage.

Mr. *Hall* has contended that this charge was not sufficiently explicit to point out the particular question as to which discovery was sought, and has said that the charge as to the deed (par. 5) was made, not as matter of law, but as matter of title. But I think the bill contains several statements of fact as to which the plaintiff is entitled to discovery. He is entitled to discovery as to this deed, and also as to the alleged facts that he is a child, and the only child, of the marriage.

No practical difficulty can arise from overruling this plea, and it seems to me quite plain that the facts which, by the plea, are admitted on the face of this bill would of themselves go far to overrule the defendant's averment that the plaintiff is not his son. Moreover, it may well be quite necessary that the plea should not be a simple plea in the form which has been placed on the record in this case. The plaintiff may be the son of the defendant in law, and yet not his son in fact; and though the maxim "*pater est quem nuptiæ demonstrant*" generally prevails, yet we know that cases of adulterine bastardy have, in rare instances, been established in our courts.

Upon the whole, therefore, I think this plea must be overruled. No leave will be given to amend the plea, because discovery is sought, which I think ought to be given. One month's time will be allowed to answer.

[1] 2 J. & H. 318.

FRY v. PENN AND OTHERS.

BEFORE LORD THURLOW, C. DECEMBER 17, 1787.

[*Reported in* 2 *Brown's Chancery Cases*, 290.]

BILL filed by plaintiff, the builder of some houses at Dudley, in Staffordshire, stating a contract for £800, but that a committee of the defendants had given directions by parol to his servants, in his absence, for alterations and further erections out of the original plan, and stating his equity to be a want of witnesses to prove such orders, praying a discovery of the orders and extra work, and to be paid for the same; the bill acknowledged the receipt of £900.

It further prayed an injunction against one of the defendants who had been employed as a plumber in the buildings, and threatened to bring an action against the plaintiff for work done, to restrain him from so doing until he had paid the plaintiff his proportion, as one of the company, for the buildings.

The defendants put in a general demurrer.

Mr. *Lloyd*, for the plaintiff, insisted that the demurrer covered too much, the plaintiff having a right to the discovery though not to relief; and therefore, being a demurrer to the whole bill, it must, according to the course of the court, be overruled.

Mr. *Selwyn* and Mr. *Johnson*, for the defendants. The plaintiff had no equity; the whole remedy is at law. He states that the orders given by the committee of five were parol orders given to his servants. These servants would be his witnesses at law. Having no equity, a general demurrer was the proper method.

Mr. *Lloyd*, in reply. If there is any thing in the bill to which the plaintiff is entitled to an answer, a general demurrer is bad. In this case he is clearly entitled to a discovery, and although the bill is improperly drawn in praying relief, yet, if they meant to take advantage of that, they might have demurred to the relief; but having demurred generally, by the course of the court it must be overruled.

LORD CHANCELLOR seemed to doubt much as to the course of the court, and to think it incumbent on the plaintiff to know what he

prayed, and that therefore, if he prayed relief where he was entitled to discovery only, the defendant might take advantage of it by a general demurrer, and the bill should be dismissed. That it was a hardship, because, upon a long bill filed, there chanced to be a right to a discovery, the defendants should be put to the expense of taking a copy, and not be able to avoid it by a general demurrer.

Mr. *Ainge*, as *amicus curiæ*, mentioned a case of Ridgley *v.* Hole, in which a bill proper for a discovery, praying relief, a general demurrer was allowed.

But Mr. *Lloyd* answering, that though that had often been pressed, it had never been done; and the course of the court to the contrary being shortly pressed,

Lord Chancellor said that the matter had been often mentioned, and his inclination had been as it was now; but if the course of the court was otherwise, the demurrer must be overruled without costs.

Mr. *Selwyn* the next morning mentioned a case of Measter *v.* Brampston, 15th March last, which was a bill filed for discovery, and praying relief which the plaintiff was clearly not entitled to: defendant demurred generally, and Mr. Scott contended the demurrer was bad, and must be overruled; Lord Chancellor said no, that as the discovery led to relief, to which the plaintiff was not entitled, the demurrer was good, and therefore allowed it.

Lord Chancellor. The only question is, whether the plaintiff shall be at the expense of a new bill, or the defendant of a new demurrer, and desired the Register to look into the case cited.[1]

[1] Price *v.* James, 2 Bro. C. C. 319, March 5, 1788. The bill was for discovery and relief in a case where the plaintiff was entitled to a discovery only. The defendant demurred generally, and Lord Chancellor [Thurlow], after a very slight argument that such a demurrer was irregular, and that it should have been a demurrer to the relief only, allowed the demurrer, saying he had had occasion to consider this subject very much lately, and that he thought it incumbent on the plaintiff to shape his bill according to what he had a right to pray. — Ed.

COLLIS *v.* SWAYNE.

BEFORE LORD LOUGHBOROUGH, C. DECEMBER 14, 1793.

[*Reported in 4 Brown's Chancery Cases*, 480.]

BY the bill, the plaintiff stated that the defendant having applied to him for leave to use his name as a trustee in a mortgage for money due to him (the defendant) from a relation, afterwards induced him, by artifice and assurances that the security was good and promises of indemnity, to advance the money; and that he (the plaintiff) became the principal mortgagee, and was afterwards evicted of the estate: he charged that the defendant, by different letters, in answer to others written by the plaintiff, considered himself as the only person liable to the risk, and had promised the payment of the money: the plaintiff, therefore, by the bill, prayed a discovery, and that plaintiff might be declared a trustee only for the defendant as to the mortgage; and to have the money repaid, as being advanced at the special request and undertaking of the defendant; offering to assign all his right to the defendant, and for further relief.

The defendant demurred both to the discovery and relief.

Mr. *Romilly*, in support of the demurrer, said that Lord Thurlow had decided that where a bill was filed for discovery of evidence, to which the plaintiff was entitled, if it proceeded to pray relief, a general demurrer both to discovery and relief was good. He cited Price *v.* James, 2 Bro. C. C. 319; Measter *v.* Brampston (cited ibid. 282); and Charles *v.* Taysum, in the Exchequer, July 1792, where this was considered as the established practice, and to have been so since Price *v.* James.

LORD CHANCELLOR, though he admitted that the plaintiff was entitled to the discovery of the letters, allowed the demurrer.

HODGKIN *v.* LONGDEN.

BEFORE LORD ELDON, C. NOVEMBER 1, 1802.

[*Reported in* 8 *Vesey*, 2.]

THE defendant answered as to the discovery, and put in a demurrer to the relief for want of equity.

Mr. *Richards* and Mr. *Heald*, for the plaintiff, objected that the defendant ought not to have answered, according to the late decisions following the rule, as settled by Lord Thurlow, that wherever the relief is unnecessary or improper, the defendant may cover himself by a general demurrer; and that there has been no instance since of a demurrer to the relief, and an answer to the discovery.

The *Solicitor-General*[1] and Mr. *Romilly*, in support of the demurrer, said the title, if any, was at law; and it did not follow from the cases referred to, that the defendant giving the discovery, which he need not give, cannot demur to the relief.

The LORD CHANCELLOR. I am of opinion the discovery does not overrule the demurrer. The defendant says the relief, if any, is at law; and he may give them the assistance of the discovery, saying he will contest their right at law, though he is not bound to give it. Lord Thurlow decided in those cases that a general demurrer will hold, though the plaintiff is entitled to the discovery, if not entitled to relief, on the ground that, the discovery being asked for the purpose of entitling the plaintiff to the relief, if the plaintiff was not entitled to the relief, he should not have the discovery which was asked for the purpose of obtaining that relief. That was contrary to the old rule. But it does not follow that it is necessary to go farther in changing the practice, and to hold that, if the defendant chooses to waive the benefit of the rule as against himself, he may not waive it, and say consistently and conscientiously the relief at law, where all the circumstances must be proved, is not a ground of equitable relief; but he will be ancillary as a volunteer by giving a discovery of the facts, upon which the plaintiff will have occasion to go to law. The rule was founded upon the convenience of the defendant; and he may waive it if he thinks proper. *Leave was given to amend.*

[1] Sir Thomas Manners Sutton. — ED.

JAMES *v.* SADGROVE.

BEFORE SIR JOHN LEACH, V. C. NOVEMBER 2 AND 4, 1822.

[*Reported in* 1 *Simons & Stuart*, 4.]

THE bill stated that John Norman and Thomas Humphrey, deceased, were, in 1813, joint-owners of a ship: that, on the 2d of March, 1813, a settlement of accounts relating to this ship took place between them, when a balance of £521 6*s.* 6*d.* was found due from Humphrey to Norman, and in order to pay that balance, three bills of exchange, all dated the 2d of March, were drawn upon Humphrey by Norman, and accepted by the former; the first payable two months, the second five months, and the third six months after date: that the first was paid when due, but before the second and third became due Humphrey died: that Humphrey made his will, dated the 5th of July, 1813, and appointed Driver and Sadgrove his executors: that on the 30th of July, Sadgrove alone proved the will, and possessed the personal estate: "that when the second and third bills became due they were presented for payment by Norman, who was informed by Sadgrove that he had no assets of the testator in his hands, and that he could not pay the bills: that Norman waited for some time in expectation that Sadgrove might possess assets to enable him to pay these two bills, but he was unable to discover that Sadgrove was in possession of such assets; and that Norman (who was master of a merchant vessel trading to foreign parts) left this country, and was chiefly in foreign parts beyond sea until the year 1820."

The bill prayed an account of the personal estate possessed by Sadgrove, and that it might be applied in a course of administration.

To this bill the defendant Sadgrove put in a plea and answer. The plea was expressed as follows: "To all the discovery and relief sought for or prayed against this defendant, except such parts of the said bill as seek a discovery, whether," &c. It then set forth the interrogatories to those statements in the bill which are included in inverted commas; after which came the plea of the Statute of Limitations in the usual manner; and then followed an answer to the excepted interrogatories.

Mr. *Lovat*, in support of this plea, contended that, although it was

settled that a plea to relief covers the discovery, a defendant might, if he pleased, give the discovery and plead to the relief, without overruling his plea. Hodgkin *v.* Longden;[1] Todd *v.* Gee.[2] *A fortiori*, if he expressly save to himself the right of answering a particular part of the bill he does not overrule his plea.

Mr. *Parker*, contra.

The VICE-CHANCELLOR. The authorities cited do not touch the present case. Admitting that a defendant may at his pleasure answer the whole bill, though he pleads to the relief, it does not follow from thence that he may plead to the relief and to a part of the discovery only, and at his pleasure answer the rest of the bill. Such a partial answer can serve no useful purpose; and the rule applies here that he who submits to answer at all, must answer fully. If the statute protects the defendant from a part of the discovery, it protects him from the whole discovery, and the partial answer overrules the plea.

November 4.

The VICE-CHANCELLOR, referring to this case, said there were possible cases in which a plea to the relief and a part of the discovery might be supported: that if, for instance, facts were stated in a bill for the purpose of taking the case out of the Statute of Limitations, the defendant would be bound to answer as to such facts, though he pleaded to the relief and the rest of the discovery; but that such was not the nature of the case in question.

[1] 8 Ves. 2. [2] 17 Ves. 274, 277.

BRANDON v. SANDS.

BEFORE LORD LOUGHBOROUGH, C. DECEMBER 15, 1794.

[*Reported in* 2 *Vesey, Junior*, 514.]

THE bill stated the following case: Abraham Brandon, on the 26th of June, 1793, lost to the defendant by playing at the game of faro, or by betting on the hands, £25, and upon the 28th of the same month, in the same manner, £75, and also upon various other days several other large sums; all which were paid to the defendant when lost. On the 13th of July, 1793, Abraham Brandon was made a bankrupt. Sarah Brandon and the other plaintiffs were chosen assignees, and brought an action under the statute 9 Ann. c. 14, within three months.

The bill prayed a discovery; and that the defendant should produce all his books, papers, and writings, relative to the matters charged by the bill; and an injunction from obtaining judgment at law, as in case of a nonsuit, until answer; and such farther and other relief as to the court should seem meet.

The defendant demurred generally.

Attorney-General[1] and Mr. *Johnson*, for the demurrer. By this act no one but the party losing is entitled to the discovery or relief. It is a mere personal liberty of suing, that does not pass to assignees. It is neither a debt nor a duty, nor any thing falling within any of the acts that vest the property of bankrupts in their creditors. Any other person suing upon default of the loser, may suggest in the same manner that the defendant is indebted to him; therefore, that phrase in the act concludes nothing against its being a forfeiture. This has been before the Court of Common Pleas;[2] two of the judges concurred in thinking it transmissible, but Chief Justice Eyre thought it merely personal, and not transmissible to executors or assignees. Unless they have a right to recover in the action, they have not a right to come here; for the bill must show an interest in the plaintiff relating to the discovery. Mit. 151, Debbeig v. Lord Howe, there cited. The bill ought to aver that the gaming did not take place within any of the

[1] Sir John Scott. — ED.

[2] 2 H. Black. 308

royal palaces at the time of the king's residence there, according to the exception in the statute. This bill prays relief; therefore, though the plaintiff should be entitled to a discovery, the demurrer must be allowed. Collis *v.* Swayne, 4 Bro. C. C. 480, and the cases there cited.

Solicitor-General[1] and Mr. *Pemberton*, for the plaintiffs. The rule founded upon those cases is, that the plaintiff shall not have the discovery to which he is entitled, in aid of relief to which he is not entitled; here the discovery is to support an action at law. In Debbeig *v.* Lord Howe, the bill stated an engagement on the part of the defendant that was perfectly honorary: the Lord Chancellor said he would not compel an answer where the bill stated an engagement merely honorary, not a right of action. In the Bishop of London *v.* Fytche, 1 Bro. C. C. 96, the Lord Chancellor said that was the first instance of a demurrer for immateriality of the discovery; though if it was for purposes obviously frivolous, perhaps the court might interfere; whether it is material or not is chiefly for the consideration of the plaintiff, who pays the costs. If the point at law is doubtful, the court will give the plaintiffs the discovery, and leave the court of law to decide whether the action is properly brought. Turner *v.* Warren, 2 Str. 1079, and Bones *v.* Booth, 2 Black. 1226, are strongly in favor of the opinion given by the majority of the Court of Common Pleas.

Reply. In the Bishop of London *v.* Fytche, the question was not upon the right of the plaintiff to sue, as here, but upon the fact with regard to which the discovery was sought.

Lord Chancellor. I have no doubt upon this. The plaintiffs stand in this court with a judgment at common law, affirming the right to sue at law; and pray the discovery necessary to support the right of action. A demurrer to that can rest upon no foundation. As the cause now comes on, it is enough that the court of law was of opinion the action was well brought by the assignees; but nothing is so clear, independent of that, as that where the statute gives an action to the party grieved, there is an interest vested in him. The limiting the time is to let in the penal action by the common informer; but while the action rests in the party injured, it is a vested interest in him, which I take to be a common and acknowledged ground of law. It is not a personal right, but the assignees have the right that was in him. Supposing, in strictness, the right of action to be in him, the assignees have a right to make him use all the remedies that he has. But the court of law was of opinion, and very rightly, I think, that the action was brought properly in the name of the assignees. There is no foundation for the demurrer. The bill prays general relief merely, not a decree for the money. The only specific relief sought is the injunction, which is a consequence of the prayer for discovery.

[1] Sir John Mitford. — Ed.

ALLAN AND OTHERS v. COPELAND AND OTHERS.

IN THE EXCHEQUER. NOVEMBER 7 AND 17, 1820.

[*Reported in* 8 *Price*, 522.]

THE plaintiffs filed this bill for a discovery and a commission for the examination of witnesses on the coast of Africa and other parts beyond seas, and for an injunction in the mean time to restrain the defendants from proceeding in actions at law commenced by them against the plaintiffs, and for further relief generally.

The action was brought against underwriters for the amount of their subscriptions to a policy of insurance on a ship, and her return cargo, lost at sea.

The bill charged, in substance, fraud and collusion, and that the ship was, in fact, lost before she had bartered or parted with her outward-bound cargo, and whilst proceeding on her voyage to the coast of Africa; and it suggested that the plaintiffs' names ought to be struck out of the policy.

A demurrer was put in on the part of two of the defendants to the bill, assigning for cause that the complainants had not, by their bill, made such a case as entitled them to any relief in a court of equity against the defendants; and that the bill was not such in form and substance as, according to the rules and practice of the court, entitled the complainants to any relief, or to any discovery against them, &c., with the common conclusion.

November 7.

Spence, for the demurrer, now contended that the prayer for relief had rendered this bill for a discovery demurrable. He submitted that the question would depend entirely on the inquiry whether this was in effect a bill for a discovery or a bill for relief, insisting that it was a bill for discovery, with a prayer for relief to which the complainants were not entitled in equity on their case as stated by the bill; and having no merits, it might be taken advantage of by general demurrer; and he

cited Price *v.* James[1] and Collis *v.* Swayne,[2] as establishing that a bill for a discovery, praying relief, was demurrable.

Fonblanque and *Raithby*, for the bill, insisted that this was effectually a bill for relief, and was supported by the merits disclosed. They submitted that relief was of two kinds, final and ancillary; and in this case the plaintiffs specifically prayed ancillary relief, and such further and other relief as the court should think their case required; and they insisted that discovery and an injunction were, in fact, relief. They cited the case of Brandon *v.* Sands,[3] as being precisely in point, and an authority determining that this demurrer could not be sustained, for that a prayer for discovery and general relief afforded no foundation for demurrer.

Spence, in reply, urged that the case cited was of very doubtful authority, and that the effect of such a mode of pleading, if permitted, would be to embarrass a defendant, and fix him with costs, by giving to a bill, substantially for relief, the shape and form of a bill for discovery.

The court (consisting of Barons Graham and Wood) took time to consider, suggesting that they would consult with the Lord Chief Baron in the mean time, before they delivered judgment.

November 17.

GRAHAM, Baron, now delivered the opinion of the court.

After stating the circumstances of the case, his Lordship observed: This may be a case wherein, upon the hearing, the court might think fit to order the policy of insurance to be delivered up; and there is a general prayer in the bill for relief. The demurrer is founded on the plaintiffs having no equity for relief, and therefore it extends to the discovery; and the question is, as was said in the argument, whether this is a bill for discovery or relief. Our first impression, certainly, was, that it was a bill for discovery; and a strong case was cited (Brandon *v.* Sands) to show that a bill praying general relief might still be a bill for a discovery only. I was somewhat staggered by that case at the time; but, on examining it, it stands on very clear and distinct grounds. That case has often, since its determination, been referred to as establishing a precedent. On being looked at, however, it will be found to be one of particular circumstances. The bill there was not filed as in this case by a party defendant in an action at law, but by a plaintiff in aid of an action brought by him to recover back money won at play, which could not be recovered in equity, but only at law. That bill, therefore, could only have been filed to obtain, through the medium of a court of equity, a disclosure of the circumstances under which the money lost had been paid.

[1] 2 Bro. C. C. 319. [2] 4 Ibid. 480. [3] 2 Ves. jr. 514.

In that case it was quite impossible to say that that was a bill for relief, because there could have been none afforded by the court of equity; and therefore it was that Lord Loughborough held that it could not be considered a bill for relief. Under the circumstances of that case, the statute (9 Anne, c. 14, § 3) gives the bill for discovery, and the party requires no relief, nor can he have any. We cannot say that that is the case here, because he may, in fact, be ultimately relieved by this suit; and therefore this may well be taken to be a bill for relief, and also for a discovery. In this case, therefore, the demurrer must be overruled.

MELLISH *v.* RICHARDSON.

IN THE EXCHEQUER. JUNE 14, 1828.

[*Reported in* 12 *Price*, 530.]

THE plaintiff and defendant had entered into an agreement in writing respecting the command of an East India ship, of which the plaintiff was owner.

Upon a subsequent communication between the parties, an arrangement was made under which the defendant relinquished and gave up the agreement to the plaintiff, as the latter alleged by the bill, with an express provision that the contract should be considered as wholly cancelled and put an end to.

The defendant, on the contrary, insisted that the agreement had been placed in the hands of the plaintiff conditionally only; and under an engagement on the part of the plaintiff that, on the occurrence of a certain event (which had happened), it should be again returned by him to the defendant, and become an operative instrument.

The agreement remained in the hands of the plaintiff.

The defendant, nevertheless, brought an action on the agreement, and was proceeding thereon.

The bill set forth at length and in detail the circumstances, making a case according with the views of the plaintiff, who thereby insisted that the agreement was no longer binding upon him. He therefore prayed, in effect, for a discovery; that it might be declared by the court that the instrument was void, and that it might be ordered to be delivered up to the plaintiff to be cancelled, with the usual prayer for an injunction to restrain further proceeding in the action at law, and for general relief.

To that bill the plaintiff filed a general demurrer for want of equity.

Anderdon, in support of the demurrer, submitted that it was perfectly well established in the courts of equity by the decisions of Lord Thurlow, which had been fully recognized and adopted by Lord Al-

vanley and Lord Eldon, that where a bill prays relief, and also discovery, if the case made be not proper for relief, even though the plaintiff should set forth a case which would entitle him to discovery in aid of proceedings at law, a demurrer, which is good as to the relief for want of equity, will extend equally to the discovery. In Hodle v. Healey,[1] and Jones v. Jones,[2] it was determined that where a demurrer or a plea to a bill for discovery and relief would hold for the relief, the plaintiff cannot have the discovery. That proposition has been still more clearly and decisively expressed by Lord Eldon (in the most recent case on this subject, Williams v. Steward[3]), who says, "It is a bill both for discovery and relief; and if it makes out a case which would entitle the party to discovery only, and not to relief, a demurrer would hold; for whatever might have been the doctrine on this subject when I first came into the Court of Chancery, it has long been perfectly established, in consequence of Lord Thurlow's decision, that the discovery is only ancillary to the relief; and that where there is no right to the relief, that which is only prayed as ancillary to it must partake of the same consequence."

The same doctrine has been held in this court. In the case of Allan v. Copeland,[4] the proposition was recognized to its fullest extent, that where the plaintiff has no equity for relief, a demurrer allowed on that ground will extend to the discovery.

It was then urged that the present case was precisely within the principle. Supposing that, in ordinary cases, the mere prayer for a declaration that the instrument on which an action is founded is void, and ought to be delivered up to be cancelled, makes the case equitable, even though there is a defence at law, that cannot apply to this case, where the instrument is actually in the hands of the plaintiff himself. In this case the declaration of the court to that effect would be merely nugatory, and no relief could be decreed. The defence is, therefore, purely legal, without any ingredient of equity to call for the interference of the court: this was, consequently, a case in which the demurrer must be allowed.

Whitmarsh, in support of the bill, contended that the demurrer could not be sustained on the ground that the plaintiff was not entitled to relief; and that if it could be supported to that extent, yet, as the plaintiff was entitled to a discovery, and the relief prayed was consequential only, the bill was not demurrable on that ground.

For that he cited Brandon v. Sands.[5]

In the case of Allan v. Copeland, it was held that the bill was not a bill for discovery merely, but for relief; and as relief might be decreed

[1] 1 Ves. & Bea. 589. [2] 3 Mer. 175. [3] 3 Mer. 502.
[4] 8 Price, 522. [5] 2 Ves. jr. 514.

on the hearing, it was not demurrable; for, although seeking a discovery, it was substantially a bill for relief, and therefore the court overruled the demurrer. The present bill, being also substantially a bill for relief, and not for discovery merely, he submitted was good, and consequently the demurrer must be overruled.

THE COURT determined that the case was clearly within the principle of the authorities cited in support of the demurrer; and they allowed the demurrer, with costs, giving the plaintiff leave to amend on payment of costs.

The bill was afterwards amended by striking out so much of the prayer as sought a declaration that the instrument was void, and ought to be delivered up to the plaintiff to be cancelled; but the ordinary prayer for relief was not struck out, and the prayer for process, which extends to a decree, was retained.

The defendant again demurred to the bill, as so amended, for want of equity.

It was now a second time contended that the amended bill was subject to all the objections before taken to it; that it was still a bill for relief, and not a pure bill for a mere discovery only, confining, as such a bill should do, its entire scope and object to that end. The prayer for relief, it was contended, pervades the whole, though no relief could be decreed. Allan *v.* Copeland proceeds on that assumption.

The authority of Brandon *v.* Sands was again referred to in support of the bill; but it was answered that that case had been completely distinguished from all the rest by the court in the case of Allan *v.* Copeland, and shown not to militate with the established doctrine upon which this demurrer was founded.

It was urged that it cannot be said that the prayer is nugatory; and it is evident that upon a bill so framed the defendant, upon putting in his answer, could not move for his costs as upon a mere bill of discovery. This places the question in the clearest light, and at the same time shows the propriety of the general rule. Where a bill to perpetuate testimony comprises the usual prayer of process embracing decree, no decree being necessary, it is objectionable in form. Rose *v.* Gunnel;[1] Burney *v.* Eyre;[2] and see Vaughan *v.* Fitzgerald.[3]

Demurrer allowed; costs to be taxed; with leave to amend.

[1] 3 Atk. 489. [2] Ibid. 387. [3] 1 Sch. & Lef. 316.

KING *v.* BURR.

BEFORE LORD ELDON, C. AUGUST 9, 1810.

[*Reported in* 3 *Merivale*, 693.]

THE bill stated that the defendant, being desirous of marrying some person of fortune, applied to the plaintiff to introduce him to a woman of that description; that the plaintiff agreed so to do; that he accordingly gave many sumptuous entertainments, to which he invited the defendant, together with various women of respectability and fortune; and that the defendant undertook to pay the expense of these entertainments. The bill also stated various letters from the defendant to the plaintiff, by which it appeared that the defendant had it in his power to marry either of the women so introduced to him that he pleased to select. It then proceeded to state further, that the plaintiff had commenced an action at law to recover the money expended in these entertainments, and prayed a discovery in support of such action. The defendant demurred generally.

The LORD CHANCELLOR, without hearing the counsel in support of the demurrer, allowed it, and said he would not give any assistance in support of such an action.

SWEET v. Doctor YOUNG.

In the Exchequer. November 22, 1757.

[*Reported in Ambler*, 353.]

Bill by plaintiff, as next of kin to Mrs. Kennon, against the defendant, who is her executor, for the undisposed residue of the testatrix's personal estate as a resulting trust, the defendant having an express legacy given him by the will, and therefore being not entitled to such residue.

The defendant by his answer said, he did not know that the plaintiff was next of kin to the testatrix, but believed that she was not; for that he had heard the testatrix say that she was not of kin to the plaintiff; and refused to set out an account of the personal estate. The plaintiff took an exception to the answer, and the question was, whether the defendant ought, under the circumstances of this case, to be compelled to set out such an account? On the part of the plaintiff it was urged, that, if the defendant did not set out the account, it might be attended with great inconveniences in case of his death; his representatives might not be so well acquainted with the affairs as he is, and the plaintiff would be a considerable loser for want of a proper discovery; that Doctor Young is very infirm, and like to die.

On the other side, it was insisted that a plaintiff is not entitled to such a discovery unless he appears to have a plain right, except in the case of a creditor or legatee. That if it should be otherwise, any person might bring a bill in equity, and by setting up a feigned and untrue title, oblige the defendant to make a discovery of every thing relative to the testator's affairs. That such inconvenience would be greater than the risk which the plaintiff runs of the executor's death before he has made a discovery. That as soon as the plaintiff has established his right by a decree, he may examine the defendant upon interrogatories; and the sooner he proceeds to hearing, the earlier he will get at the discovery, and consequently run the less risk. Mr. *Capper*, of counsel for the defendant, cited the case of Gethin and his Wife *v.* Gale, 24th October, 1739, in Chancery. Benjamin Gale, by his

will, gave his real estates to his nephew Robert Henry Gale in tail. Bill by plaintiffs against the defendant Robert Gale, and Elizabeth Gale, the widow of Robert Henry Gale, personal representative of the testator, suggesting that Robert Gale was not legitimate son of Robert Henry, and that plaintiffs, in right of the wife, were entitled to the real estate as heir-at-law to the testator; and praying an account of the personal estate of the testator, and that it might be applied in discharge of a mortgage secured upon such real estate. The defendants insisted in their answer that the defendant Robert Gale was the legitimate son of his father; and Elizabeth Gale gave an account of the marriage, but insisted that, as the plaintiffs were not entitled to any debt or sum of money owing unto either of them from the estate of the said Benjamin Gale, or to any legacy under the said will, she was not compellable to account for or discover unto the plaintiffs the testator's personal estate; submitting to be examined upon interrogatories touching the same as the court should direct at the hearing. The plaintiffs took exception to the answer as insufficient, in not having discovered the personal estate; which was allowed by the Master, and exceptions taken to his report. And Lord Hardwicke was of opinion that where a plaintiff's right is not apparent, but remains in doubt, he is not entitled to such discovery, except in the case of a creditor or legatee of the testator; and allowed the exceptions to the Master's report.

PARKER, CHIEF BARON. If the fact is denied, and lies in the knowledge of the defendant, the plaintiff is not entitled to a discovery of assets. That was the case of Gethin *v.* Gale; the mother swore in her answer that her son was legitimate. But if the fact does not lie in his knowledge, though he denies it, yet he must set out an account of assets. There is no inconvenience to the defendant in making such a discovery; but it may be very great the other way.

ADAMS, BARON (LEGGE and SMYTHE being absent), agreed with the Chief Baron. Exception allowed.

Q. The justness of the distinction? The counsel for the defendant were dissatisfied with it.

COOKSON v. ELLISON.

BEFORE LORD THURLOW, C. JULY 21, 1787.

[*Reported in* 2 *Brown's Chancery Cases* (*Belt's ed.*), 252.]

THE plaintiff made a party defendant, who was merely a witness to a conversation [with her late husband and testator, relative to the fortune of his daughter, the defendant's wife], and might have been examined as such, and therefore might have demurred to the bill. The defendant put in an answer, and not having satisfied the plaintiff as to one interrogatory [viz., whether, if any promise was made by the testator, he did not in the course of the conversation retract the same], the plaintiff took an exception, and the Master reported the answer sufficient. Upon exceptions to the Master's report, it was objected that the defendant need not have answered at all, but might have availed himself by demurrer or plea.

LORD CHANCELLOR said, as the defendant had submitted to answer, he could not enter into the question whether a demurrer or plea would have been allowed; that the practice of making a mere witness a party was extremely wrong, and that he should have encouraged a plea or demurrer had it come on in that shape; but that where a party submits to answer, he must answer fully, and therefore the question being such as would be clearly relevant if put to a party properly before the court, he must allow the exception.

NEUMAN *v.* GODFREY AND OTHERS.

BEFORE SIR LLOYD KENYON, M. R. EASTER TERM, 1788.

[*Reported in* 2 *Brown's Chancery Cases*, 332.]

THE bill was filed by the plaintiffs, on behalf of themselves and other German merchants who used to employ Benjamin Mee, since become a bankrupt, as a factor *del credere* in selling linens and other goods to customers in England, at a certain rate of credit; and it stated, among other things, that the defendants, among whom was enumerated the defendant, Daniel Nantes, formerly clerk to Mee, were, for a considerable time before the bankruptcy, creditors of Mee, and that the defendants, being desirous to obtain a security for their debts, had conversations and consultations together, at which it was agreed that they should get from the persons to whom Mee had sold goods belonging to the plaintiffs or the other German merchants, as much of the money as they possibly could, either in money or notes, and that they accordingly got from them several large sums of money and acceptances for notes; and the bill went on to state the defendant to have obtained several sums from other debtors for goods consigned from the German merchants. The defendant by his answer said that Mee was not, for a considerable or any length of time before the month of April, 1784 (the time of the bankruptcy), indebted to him in any sum of money whatsoever, except a small sum for his salary as his clerk, which, at the time of the bankruptcy, amounted to £9 or thereabouts, and denied that he was desirous that his debt should be paid out of the money paid as factor to the plaintiffs, or that he had any consultations with Mee or the other defendants respecting the manner in which Mee should discharge his debt, or that Mee indorsed any bill to him, or by any means let him have the benefit of the sums of money or bills charged in the plaintiff's bill; and the defendant disclaimed all interest in the sums of money, bills, &c., inquired after by the plaintiff's bill.

To this answer the plaintiff took a great number of exceptions, on account of the defendant not having answered the subsequent parts of the bill. Upon arguing the exceptions before Master Hett, he overruled them, and reported the answer sufficient. Upon exceptions to the Master's report,

Mr. *Mansfield*, Mr. *Scott*, and Mr. *Hollist* argued that the defendant Nantes was not a mere witness, but a party against whom relief was to be obtained; he is charged as being a party in a fraudulent transaction; he may, therefore, be put to answer to the circumstances of the fraud; all he has done is to deny that he received any of the money, but this is not sufficient. Suppose we should be able to prove that he was a creditor, and was paid out of these funds, we should have a right to his answer to the further circumstances. He is charged in the bill as clerk. In that capacity he is liable to answer. Like the case of attorneys, who are liable to answer to the circumstances of things done in the course of business: as such, having put in an answer as a defendant, he should have answered the whole case. Cookson *v.* Ellison, 2 Bro. C. C. 252.

Mr. *Mitford* and Mr. *Steele*, for the defendant. The judgment which the Master has formed is right. Nantes was not bound to answer further, unless there is some special circumstance to compel him so to do. He was made a party merely as being a creditor. If he had been charged to have received the sums as book-keeper, it would have been very doubtful whether he could have been compelled to answer, as being similar to the case of an attorney. He has answered that he was a creditor only to the amount of £9, and that he has not received any of the bills or notes; further than that, he stands merely in the light of a witness. If they could prove that he had received any money, he would on this answer be compelled to repay it, as having disclaimed being a creditor. The case of Cookson *v.* Ellison does not apply; there the party had answered part of the circumstances; he had stated a part of the conversation, and the exception taken was that he had not stated the whole.

His Honor for a long time doubted whether the defendant was not called upon in a further character than as a witness; but at length said that the defendant, having sworn that he is not a creditor, nor had received any of the money, had done away all his interest, and reduced himself to the case of a mere witness. If they can prove him to have received any of the goods or money, he cannot hold them, having disclaimed all title to them. He can put himself in no worse situation than by such disclaimer. It is a principle that a mere witness shall not be made a party to a bill. I was struck by the observation that, by some parts of his answer, it might appear that he had further claims; but his answer is such that he can have no title. If such a person was to be made a party, I do not know where it would end; it would rake into every circumstance of a man's life to prove him a bad man. I think the Master was right in disallowing the exception.

Exceptions to the Master's report overruled.

CARTWRIGHT *v.* HATELEY.

BEFORE LORD THURLOW, C. MAY 4, 1791.

[*Reported in* 1 *Vesey, Junior*, 292.]

THE bill was brought by the executors of Lord Dudley and Ward, for a discovery and account of all the money received and paid by Thomas Hateley and John Hateley, his son, in the management of his Lordship's coal works. Both defendants were charged, as agents in that management at a salary from Lord Dudley and Ward. The son by answer insisted that he was not agent for Lord Dudley and Ward; but was employed by his father, who paid him a salary. Upon exceptions the question was, whether it was competent to the son to insist upon this in his discharge; and supposing it was, whether he could do it by answer. The father on this day submitted to account.

Attorney-General [Sir Archibald Macdonald] and Mr. *Abbot*, for plaintiff. The son having been employed, and received money for his father, is accountable to the executors; and it is not material that he might be accountable to his father; which will not prevent him from being likewise accountable to the executors. But he cannot take advantage of this by answer. Both Lord King and Lord Macclesfield have determined that a defendant cannot by answer insist that he is not obliged to answer; but it must be by plea; and your Lordship decided so in the case of Williams *v.* Farrer, in this court.

Solicitor-General [Sir John Scott], for defendants. There was an action at law against the father, but not against the son, because they considered him as a clerk to the father.

LORD CHANCELLOR. If he was employed under the father, even to the whole extent to which the father was employed, and accounted to him, he might be a witness, but cannot be an accounting party to the plaintiffs. But this cannot come on by exceptions. If he had pleaded that he had no concern in this business but as agent for his father, and consequently was not accountable to the plaintiffs, that plea might have barred every thing. I cannot, consistently with general rules upon exceptions, treat an answer as being as conclusive as a plea. I remember a case before Lord Bathurst, who did take some such measure, but I know the propriety of it was doubted at the bar, and by me; though I believe I obtained the order. There parties had matter to allege against being obliged to set forth very voluminous accounts; and Lord Bathurst, to prevent the inconvenience of a great expense to the parties, took a pretty strong measure upon it. But I do not like

to adopt it, for to do so we must say, that if there is any part of the answer, which, if made out, would entitle the party to a decree, he need not answer the rest. I determined this point in this way yesterday upon argument.[1] Then as the case stands, plaintiffs will have the oath of the defendant John as to all he acted in under his father; and he will have his costs for being brought here at all, for the bill must be dismissed against him with costs, being a bill for discovery against one not liable to an action at law, and not engaged in the business at all. They have brought a bill against a witness, and as he has answered, I cannot deliver him from answering fully; but he must have his expenses for being brought here; and I think it ought to be as between attorney and client. But the question is, as the father is willing to account, whether plaintiffs will go to a decree *ad computandum* against him, waiving their action at law, with liberty to examine the son and all other parties upon interrogatories; for they cannot get a decree *ad computandum* against the son, though they may oblige him to answer, and perhaps get it from him in a less efficient manner than by interrogatories. If they will take the decree so, they must pay him his costs now; if not, overrule the exception and let him answer.

The plaintiffs agreeing to the proposal, Lord Chancellor decreed that plaintiffs should waive their action (which had only proceeded as far as the plea) and go to an account against defendant Thomas, with liberty to examine defendant John and all other parties upon interrogatories, and costs to John as far as related to his being a defendant; both parties undertaking to pay, &c., as in case of a decree *ad computandum*. *Costs given.*

[1] Shepherd *v.* Roberts, 8 Bro. C. C. 239, is stated by the reporter to have been decided by Lord Thurlow on the same day as the above. The report of it is as follows: Cooke was concerned in two partnerships, one with Kilner, another with Wilkinson, and carried on a separate trade: a separate commission of bankruptcy issued against him, under which he obtained his certificate. The bill was by the plaintiff, for an account of another trade, in which plaintiff claimed to be a partner, and which was carried on in the names of Shepherd & Co. By answer, Cooke set forth that the plaintiff was a day laborer, and had nothing to do with the business, which was only a negotiation of notes in the names of Shepherd & Co. Exceptions being taken to the answer, it was reported sufficient; and an exception being taken to the Master's report, Lord Chancellor allowed the exception, on the ground that the defendant should have pleaded that the plaintiff was not a partner.

In 8 Bro. C. C. (Belt's ed.) 488, is the following note to this case, taken from Sir J. Simeon's MSS.: "N.B. — In Shepherd *v.* Roberts, the defendant put in a further answer, denying he had any partnership assets, screening himself under the implied assertion that there was no partnership. On exceptions, the Master thought the answer substantially the same with the former, and therefore thought himself bound by the Chancellor's order to allow the exceptions; and on exceptions to the Master's report, Lord C. thought his former opinion wrong, and that the defendant might protect himself against the discovery by denying the partnership, and therefore allowed the exceptions to the Master's report." — Ed.

JACOBS *v.* GOODMAN.

IN THE EXCHEQUER. NOVEMBER 16, 1791.

[*Reported in 3 Brown's Chancery Cases, 486, note, and in 2 Cox, 282.*]

THIS was an injunction bill filed by plaintiff, in order to enjoin defendant from proceeding in an action at law, commenced against him for the recovery of £100 borrowed by the plaintiff of defendant; and the bill stated a partnership to have existed between plaintiff and defendant, and an account unsettled between them in respect of the partnership; and it alleged that, on taking the account, it would be found that nothing was, in fact, due upon balance of all accounts to the defendant, and the bill called for an account of the partnership transactions. Defendant, by his answer, stated the agreement respecting the business to be, that plaintiff came to him and represented that he was well versed in the trade of glass and beads, and that if defendant would engage in it, he (the plaintiff) could be of great assistance to him; that it being convenient to defendant to advance the necessary sum, he did accordingly engage in the business, agreeing that if at the end of six months it appeared that plaintiff had managed the trade to advantage, he should be allowed one-third of the profits; and defendant denied that plaintiff had any other concern in the business, or that he was liable for any of the transactions thereof, save as it might happen for misconduct as a servant; and further denied that there was any agreement between them other than as aforesaid, or that they had any connection in business other than as aforesaid. He further stated in his answer that this £100 was borrowed of defendant by the plaintiff, in order, as he said, that he might assist a sister who was in business; that plaintiff left defendant at the end of nine weeks, and then wrote to him an apology for thus leaving him, but adding, that he would send him the £100 in a few days. Exception was taken to this answer, because defendant had set forth no account, and because defendant had not set out what balance was due to him, and how he had made out the same.

Mr. *Johnson*, in support of the exception, stated that defendant

could protect himself from setting out an account only by a plea or demurrer, and that, having answered, it was not sufficient to deny a principal fact, which would be a defence, but he must go on to answer all the collateral matter.

But the court were of opinion that the answer was sufficient in this case.

Lord Chief Baron.[1] You are not entitled to an account, unless there be a partnership, and your petition goes much too wide. At that rate, if an utter stranger was to file a bill against Child's shop, alleging a partnership, it could not be sufficient to deny that any such partnership existed. There may be cases where the court will require an account, although the principal point in the bill is denied. But not in a case like this. Suppose to a bill for tithes the defendant answered he was no occupier, or in many other cases of that kind, would not such an answer be sufficient? *Exception overruled.*

[1] Eyre.—Ed.

HALL, Widow, and Others v. NOYES and Others.

Before Lord Thurlow, C. March 13, 1792.

[*Reported in 3 Brown's Chancery Cases*, 488.]

Bill by the executors of Hall, who had become a bankrupt, and was since dead, against the defendants, praying accounts of profits received from leasehold property assigned to them by the bankrupt, and a redemption of the same upon payment of money really advanced, with interest.

The bill stated that the trustees appointed by an act of Parliament for dividing commons, &c., in the parish of St. Mary, Newington, in Surrey, demised premises situate at Walworth Common, to Hall, the bankrupt, for ninety-nine years, at the rent of £66 per annum, and that John Neale had also let to Hall a close at Hazard's Bridge for sixty-five years, at a rent of £80 per annum; that afterwards Hall becoming a bankrupt, and having obtained his certificate, repurchased the premises from his own assignees for £245; that the close at Hazard's Bridge, being very valuable on account of its containing a large quantity of brick earth, and having it in contemplation to make bricks there, and wanting money for that purpose, Hall applied to the defendant Noyes to assist him with a loan, which Noyes agreed to do, but as a security required Hall to make an assignment of one moiety of the close to him, which was accordingly done, upon a nominal consideration of £262 10*s.*, but which was not paid, Noyes only giving Hall three promissory notes for £30, £20, and £20, the acceptance of a draft by Hall for £100, and a sum of £40 in cash; that Hall having granted building leases of some of the premises, and having occasion for money, applied to Cross, afterwards a bankrupt (of whom some of the defendants are assignees), and requested him and the defendant Noyes to advance him £1000 on the mortgage of the lease of the ground at Walworth, and of the other moiety of the close at Hazard's Bridge; but the said sum of £1000 was not all paid to Hall, but some part of it only, to the amount of £245; and Hall having contracted with one Pye for the purchase of a leasehold estate at Kent Bar, for the remainder of a term of twenty-one

years, for £335, and Noyes and Cross having given some security to Pye for such £335, said £335 also made part of such consideration money, and Pye and Hall assigned the said leasehold estate, subject to the reserved rent thereon, to Cross and defendant Noyes, subject to redemption on payment of the said sum of £1000 and interest, and Noyes and Cross took from Hall his bond and warrant of attorney as a further security, upon which warrant of attorney judgment was afterwards entered up. The defendant Noyes afterwards having lent or pretended to have lent Hall promissory notes to the amount of £271, as a security for the same, took his bond in the penalty of £600 for securing payment of £300 and a warrant of attorney for the same, upon which he afterwards entered up judgment, and caused writs of *fi. fa.* to be issued, and, by means thereof, levied and had satisfaction for all or nearly all the money due.

The bill further stated that a commission of bankruptcy was soon afterwards issued against Cross, and the defendants Carr and Evans were chosen assignees.

The bill further stated that the defendant Noyes, in August, 1776, got into possession of the close at Hazard's Bridge, or of one moiety of it, and made considerable profits by cutting and making hay thereon, and taking in cattle to feed, and on behalf of himself and Cross, or his assignees, got into possession of and into the receipt of the rents of the mortgaged premises, and by that means was satisfied the interest and part of the principal of the said £1000: that Hall being involved in debt, Noyes and the other defendants took advantage thereof, and got him to sign an account that £1400 was due from him on the mortgage, and also that he was indebted to Noyes on other transactions £80, and got him to execute a second mortgage to secure £1451 and £80, and interest, with a power to sell and to take the sum for which the premises should be sold as a security for the said sum and interest, with a trust to pay the surplus, if any, to Hall. The bill then stated that Hall and Noyes made a considerable quantity of bricks on the close at Hazard's Bridge, and that Noyes having taken an absolute assignment of one moiety of the said close, but being conscious that it was intended only as a security for the money really advanced, but pretending that by virtue of the assignment he was entitled to one moiety of the said close, he, as an inducement to Hall to execute the indenture of 6th July, 1780, gave him to understand that if he would do so, and would allow him, defendant Noyes, £210 as the money advanced by him on the said assignment, and £266 which he pretended to have laid out in making bricks (though he had not laid out so much), and would let the said moiety be a security for the same, as well as for said sums of £1451 and £80, he, the defendant Noyes, would permit

Hall to redeem and become the owner of said moiety, and by such means Hall was induced to execute the said deed; and a deed-poll was accordingly prepared under the direction of defendant Noyes, and duly executed by Hall and Noyes, reciting those terms, and it was thereby witnessed, that in case Hall should pay the said sums and all Noyes's future disbursements on account of the moiety, on or before the 6th October then next, Noyes should reassign the premises to Hall. The bill further stated that the defendant had sold the premises at Kent Bar to one Rolls, and had sold a moiety of the close at Hazard's Bridge (being, as is alleged, the moiety which was comprised in the deed of 6th July, 1780) by auction to one Robinson, but in fact in trust for Noyes (to whom it had been afterwards assigned), for £105, who had procured the lease to be delivered up to him; that in December, 1781, he surrendered the lease to the landlord of the premises, and obtained from him a new lease, dated 22d December, 1781, for twenty-one years from Christmas then next, at the rent of £15 a year, whereby the landlord gave defendant Noyes license to break up the soil and make bricks thereon, upon payment of a fine of £925 in addition to said rent of £15 yearly.

The bill further stated that defendant Noyes made large quantities of bricks, by means whereof, after payment of the rent and fine, large profits were made. It then stated that Hall, being taken in execution for debt, assigned his equity of redemption (for a nominal consideration of £500, but of which he received only £40) to the defendant Schoole, who assigned one moiety thereof to the defendant Rybot, and the death of Hall without being able to redeem, and that by his will he made the plaintiffs executors; that Noyes and the other defendants were still in the possession of the premises at Hazard's Bridge and Walworth, and by the profits thereof had been fully paid the sums really advanced to Hall, and had a considerable surplus in their hands; and therefore the plaintiffs insisted they had a right to redeem, and prayed an account of the rents and other profits of the mortgaged premises, and that the same should be applied in sinking the principal and interest of the debt, and that upon payment of the residue the defendants might reassign the premises to the plaintiffs.

The defendants put in very long answers to this bill, stating the transactions very much at large, but of which the import was, to insist that the real transaction was a sale from Hall to them, and after such sale the defendant Noyes acknowledged that he made bricks on the premises at Hazard's Bridge, but insisted that he was not bound to discover what quantity of bricks were made, or to set forth whether other profits had been made from the said close, or any particulars relative thereto, as it appeared by plaintiff's own showing that Hall had assigned

all his interest in the premises to Schoole, and that the same is now vested in defendants Schoole or Rybot; and, for the same reasons, the defendants insist plaintiffs are not entitled to any account of the rents, profits, or produce of the premises; and in a further part of their answer the defendants said, "they hoped they should be allowed such benefit of the several mortgages and circumstances before set forth in bar of such discovery and relief, as if the same had been set forth by way of plea or demurrer to the said bill."

To this answer several exceptions were taken, some of which had been allowed by the Master, but others disallowed by him. The disallowed exceptions went to the answer not having discovered the profits made of the close at Hazard's Bridge, either by cutting hay thereon, or otherwise, or how the debts for which the mortgages were made were incurred, and particularly as to the number and quality of the bricks made on the premises at Hazard's Bridge, or the sums of money received for the same.

It came on now upon exceptions to the Master's report.

Mr. *Mansfield*, Mr. *Lloyd*, and Mr. *Abbot*, for the defendants, argued that although they had submitted to answer in a case where they might have pleaded or demurred, yet the general rule, that where a party submits to answer he must answer fully, did not apply in the present case; that submission will not entitle the plaintiff to a long account in a case where a defence is set up that meets his title. Here the defence on the part of the defendant Noyes is, that he is a purchaser, not a mortgagee, and that defence is not merely set up by Noyes, but it appears upon the face of the bill, and is affirmed by Hall himself in his lifetime. If the plaintiffs can make a case to show they have a right to redemption, then they will be entitled to have an examination as to every particular now excepted to; but till they show that, they are not entitled. It is not charged in the bill that the assignment to Schoole was fraudulent. Schoole may now obtain the absolute interest in the estate; and whilst his title is out against the plaintiffs they can have no relief. Wherever an answer denies the matter of the suit, the court will not compel the defendant to answer what is consequential to the decree; it will not enforce an account whilst the title is doubtful. Sweet *v.* Young, Ambl. 353, shows that where the plaintiff's title is doubtful, the defendant is not compellable to set forth an account. So in Gethin *v.* Gale, there cited, which was a bill for the possession of real estate, upon the ground that the defendant was illegitimate, Lord Hardwicke was of opinion, till this was established, the plaintiff had no right to an account. So in a case in the Exchequer, where a defendant, though he had not pleaded that he was a purchaser for valuable consideration, but had insisted upon it (as is done here) by answer, the

late Mr. Baron Perrot said he should not be obliged to produce his title-deeds. Whilst the plaintiff's right is in contest, the account is immaterial; and whilst immaterial, the court will not compel it. Gilb. Forum Romanum, 106. The case in 2 Vesey, 445 (Buden v. Dore), is to the same purpose, though in that case the defendant might have pleaded. To the same effect was ——— v. Taylor before Lord Bathurst. In Jacobs v. Goodman, in the Exchequer, Nov. 16, 1791, the defendant said in his answer that plaintiff was a servant, not a partner, and therefore resisted the account. The Lord Chief Baron held the plaintiff not entitled to an account until he proved a partnership; because otherwise any person, by alleging a partnership, might entitle himself to an account. If parties cannot plead in bar to the account, but must answer, this inconvenience will follow, that any person may have an account. The principle on which the plea in Neuman v. Wallis, 2 Bro. C. C. 143, was overruled, does not extend to all cases; it applies where the plea goes to the whole case, but not where the title and the account are separate, and the account is consequential to the title: though the court will compel an answer as to the title, it will not compel an account till the title is established. Here it is a preliminary point that the party has put the title out of himself.

Lord Chancellor, in the course of the argument, and at the close of it, said, that supposing the case supplied matter for a demurrer, he could not take notice of the cause of demurrer on exceptions. It might have been cause of demurrer that Hall, having assigned his equity of redemption to Schoole, till he had displaced that estate, had not a right to a discovery: in such a case, the defendant might have met the plaintiff's title by a plea; and though he had held upon a former occasion that a negative plea was bad, he believed he was wrong in holding so; for that wherever a plea will reduce the question to one point it is admissible. All the cases cited were cases where the title was completely separate from the account; in that before the Lord Chief Baron it was completely so; and he could not say that where it was so, the party was bound to give the account, but in the present he thought they were, and therefore allowed the exceptions.

SELBY v. SELBY.

BEFORE LORDS COMMISSIONERS EYRE, ASHHURST, AND WILSON.
TRINITY TERM, 1792.

[*Reported in 4 Brown's Chancery Cases (Belt's ed.)*, 11.]

THIS was a bill filed against the defendant, who claimed as heir-at-law of the late Thomas James Selby, Esq. It interrogated very particularly as to the ancestor or ancestors under whom the defendant claimed, and, among other things, in what parish each and every of the persons by or through whom the defendant claimed to be heir-at-law of the testator, was or were born, and in what parish each and every of such persons was or were baptized, married, and buried respectively.

In the answer, the defendant said he could not answer as to the places of birth, &c., of some of his ancestors, or set forth to his knowledge or belief where or in what place, &c., not using the word parish.

The Master by his report had certified that he conceived the answer to be sufficient to a common intent.

To this report the plaintiff took several exceptions, the first of which was, that the Master ought to have certified the answer insufficient, it not having set forth in what parish the persons named were baptized, &c.

Upon arguing these exceptions, it was contended by Mr. *Selwyn* and Mr. *Ainge* for the defendant, that the answer was sufficient, and that the particularity of these interrogatories would have been ground for a demurrer, and the case of Neuman *v.* Godfrey[1] was mentioned, where the party having answered so much of the bill as related to his own interest, he was held not compellable to answer the particular circumstances stated.

On the other side, it was contended by Mr. *Solicitor-General*[2] and Mr. *Richards* that it had been determined in the cases of Cookson *v.* Ellison,[3] Cartwright *v.* Hateley,[4] and lately in a case of Shepherd *v.*

[1] 2 Bro. C. C. 332.
[2] Sir John Scott. — ED.
[3] 2 Bro. C. C. 252.
[4] 3 Bro. C. C. 288.

Roberts,[1] that, even when the party might demur, if he submit to answer, he must answer fully.

Lord Commissioner Eyre said, it had been constantly the practice in the Court of Exchequer, upon arguing exceptions, to admit the question to be argued how far the party was bound to answer the interrogatories put to him; but he should be glad to take advantage of the rule that Lord Thurlow had laid down in particular cases, and to apply it to all, that wherever the party is not obliged to answer the interrogatories put, he must take advantage of it by demurrer.[2]

[1] 3 Bro. C. C. 239.

[2] The exceptions were allowed, a demurrer on the part of the defendant having been long previously overruled by Lord Thurlow. From the notes of Lord Colchester, Sir J. Simeon, and Mr. Cox. *Et vide* Coop. Ca. Ch. 213, 214.

JERRARD v. SAUNDERS.

BEFORE LORD LOUGHBOROUGH, C. AUGUST 1, 2, AND 4, 1794.

[*Reported in* 2 *Vesey, Junior*, 454.]

THE bill stated the following case: In 1711 John Harrington, seised in fee, demised to Gould for a term of 1000 years, which, about the year 1730, being by mesne assignments vested in Harris, subject to a mortgage to Bellamy, was purchased by Christopher Jerrard; and by indentures between the mortgagee Harris, Christopher Jerrard, and his trustees, some time in or about the year 1730, the more particular date whereof the plaintiff has not been able to discover, as such deed is in the custody of the defendant, the premises were assigned for the remainder of the term in trust for Christopher Jerrard for life; remainder to his son Thomas Jerrard and Susannah his wife for the lives of them and the survivor; remainder for all and every the child and children of their bodies living at the death of the survivor, their executors, &c.; in default of such issue, then subject to the appointment of Christopher by deed or will; in default of appointment, for the executors, administrators, and assigns of Thomas. Christopher held till his death in 1749; then Thomas entered, and held till his death about fifteen years ago; his wife died in his life, and the plaintiff, as their only surviving child, entered. The defendant, under color of some mortgage from Thomas Jerrard, has got in his possession the settlement of 1730 and the other title-deeds, and has filed a bill of foreclosure, and brought two ejectments. The bill charged that the defendant knows that such settlement, or some other, was executed by Christopher Jerrard, whereby the plaintiff is entitled as aforesaid, or to some other interest in the premises, and the defendant or some person with his privity now has, or lately had, the said deed, or some counterpart, duplicate, abstract, extract, recital, minute, or memorandum, thereof; and the defendant has seen and heard the contents, and knows such settlement did or does exist, and where it now is, and in whose custody he last saw it, and what is become of it; and in case it has been torn, defaced, burnt, obliterated, cancelled, destroyed, or made away with, that was done by

or with the privity of the defendant to defraud the plaintiff; and that the defendant knows that Thomas Jerrard was only tenant for life, and had no right to make such mortgage, &c., and knows and believes that an abstract of Thomas Jerrard's title, including the said settlement of 1730, and wherein some notice, recital, or memorandum thereof, and of the trusts and the rights of Thomas Jerrard and the plaintiff, or some assertion or suggestion tending to a discovery thereof, and of the plaintiff's claim, was made, was sent and delivered to the defendant and the several mortgagees and incumbrancers under whom he derives, or some agent for them, before execution of the mortgage under which the defendant claims, and payment of the consideration, which the defendant knows and believes was after he and they had perused the said settlement, and had full notice of the trusts. The bill therefore prayed that the defendant might answer, and produce the settlement, and all other title-deeds, &c., and an injunction from proceeding at law.

The defendant pleaded a mortgage, without notice actual or constructive; which plea was overruled, because the facts from which notice was inferred were not denied.[1]

An answer was then put in, stating a feoffment of March, 1731, by Christopher Jerrard to Harris, in trust for Christopher Jerrard, his heirs and assigns; that on the death of Christopher the premises descended upon his son Thomas, who, on the 1st of June, 1749, mortgaged to Bayley. The answer then stated several assignments of that mortgage, by which, in 1763, it became vested in Alice Dicker, who, by will, in 1774, gave all the residue of her personal estate and securities for money in trust for her grandson, the defendant, in case he should attain twenty-one; under which, in 1784, the said mortgage was assigned to the defendant; that Thomas Jerrard, by his will, in 1777, reciting the mortgage made by him, directed that it should remain a charge upon the premises, and not be paid out of his personal estate; that he was in possession, and pretended to be seised in fee at the time of the mortgage. The answer then stated that those under whom the defendant claimed were mortgagees for valuable consideration, without notice of the settlement, &c.; and that the defendant does not know or believe that an abstract of Thomas Jerrard's title, &c., was sent, &c. (directly as charged in the bill), to Alice Dicker, or any of the said mortgagees; that the defendant has no objection to produce the originals of the deeds set forth; that he believes Alice Dicker actually paid the said mortgage money, without any notice whatever of the title set up by the plaintiff; and therefore, and because the plaintiff does not offer to confirm the mortgage, and this court does not compel a discovery, which might hazard the title of a mortgagee *bona fide*,

[1] 2 Ves. jun. 187.

and without notice, the defendant insisted upon these several matters as if he had pleaded them in bar to the discovery prayed, touching the lease by the bill alleged to have been made by Harrington, or the assignments, or the settlement therein stated, upon which the plaintiff founds her claim to the mortgaged premises, upon which the mortgage now remains due to the defendant, with a large arrear of interest and costs.

A great number of exceptions were taken to the answer, and were allowed by the Master, upon the principle that a defendant who submits to answer is bound to answer fully. The point came before the court on exceptions to the report.

For the plaintiff were cited Cookson *v.* Ellison, 2 Bro. C. C. 252, and Shepherd *v.* Roberts, 3 Bro. C. C. 239.

For the defendant the following cases were mentioned: Finch *v.* Finch, 2 Ves. 491; Earl of Suffolk *v.* Green, 1 Atk. 450; that though a plea or demurrer is overruled, the same matter may be insisted upon by answer: East India Company *v.* Campbell, 1 Ves. 246; Gunn *v.* Prior; where the plaintiff claimed as heir suggesting an outstanding term; a plea that he was not heir was overruled; the defendant then answered to the same effect, and insisted that he was not bound to answer further; the Master reported the answer insufficient; but on exceptions Lord Kenyon would not make the defendant answer, unless the plaintiff would go to issue, to try whether he was heir or not.

It was also said that in Shepherd *v.* Roberts, Lord Thurlow, upon exceptions to the further answer, changed his opinion; and that in Neuman *v.* Godfrey, 15th April, 1778, Lord Kenyon said Cookson *v.* Ellison was wrong.

Lord Chancellor. I am relieved from all difficulty as to the two cases before Lord Thurlow. Cookson *v.* Ellison is certainly mistaken; and though the other is truly reported, it appears that Lord Thurlow afterwards changed his opinion. Those are the only cases that at all embarrassed me. I have looked into Rogers *v.* Seale, 2 Freem. 84.[1] It is impossible that could be the determination of Lord Nottingham; that if the plaintiff has a legal title, the defendant cannot protect him-

[1] Decided in Hilary term, 1681. The report is as follows: The plaintiff derives his title under one Jo. Pope, by a will in 1659, and exhibited his bill to discover writings in the defendant's hands. The defendant pleaded that he purchased the lands in question of the said Jo. Pope in 1675 for £100, without notice of the plaintiff's title, and demands judgment.

The plea was overruled upon this difference: where the plaintiff hath a title in law, there, though the defendant doth purchase without notice, yet he shall discover writings; but otherwise it is if the plaintiff hath only a title in equity; for there, if the defendant purchased without notice, he shall never discover nor make good the plaintiff's title. *Plea overruled, but without costs.* — Ed.

self as a purchaser for valuable consideration; but he may, if the plaintiff has an equitable title. It is directly contrary to what he laid down soon after he got the Great Seal.[1] The very reverse was often stated by him; it was laid down by him that against a purchaser for valuable consideration this court had no jurisdiction. Fagg's case[2] was determined by him; the defendant had picked up from the conveyancer's table the deed that affected his title; and though he got it in that manner, Lord Nottingham would not oblige him to set it forth. A case that occurred to my recollection produced many points; it is Basset *v.* Nosworthy, Finch, 102. The plaintiff took up the cause as heir of Lady Seymour, claiming under a legal title; the defendants set up a purchase for valuable consideration without notice; Lord Bridgeman had overruled the plea; in consequence of which a great variety of proceedings took place in this court. It came before Lord Nottingham; he reversed Lord Bridgeman's order, and suppressed all the proceedings that took place in consequence of the production and discovery. The book does not state it amiss: "A purchaser *bona fide*, without notice of any defect in his title at the time he made the purchase, may buy in a statute, or mortgage, or any other incumbrance; and if he can defend himself at law by any such incumbrance bought in, his adversary shall never be aided in a court of equity for setting aside such incumbrance; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz., where the court hath refused to give any assistance against a purchaser either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another."

I am perfectly satisfied upon the general reasoning that this court will never extend its jurisdiction to compel a purchaser, who has fully and in the most precise terms denied all the circumstances mentioned as circumstances from which notice may be inferred, to go on to make a further answer as to all the circumstances of the case that are to blot

[1] Burlace *v.* Cook, 2 Freem. 24. [Trinity term, 1677. "An heir exhibited a bill for discovery of evidences concerning lands that were his ancestor's; the defendant swore that he was a purchaser of the lands, and the heir demanded a sight of his deeds and writings; but, *per Cancellar'*, he shall not see them; for although the heir *prima facie* hath a legal title, he may go into a court of law if he pleaseth, but this court will not compel the showing of writings to any person, unless he hath an equitable title, as a mortgagee, &c., and that is the difference between a legal and an equitable title." — Ed.]

[2] Cited 1 Vern. 52. ["Sir John Fagg, being a purchaser, came into a man's study, and there laid hands on a statute that would have fallen on his estate, and put it up in his pocket; and in that case, he having thereby obtained an advantage in law, though so unfairly and by so ill a practice, the court would not take that advantage from him." — Ed.]

and rip up his title. To do so would be to act against the known established principles of this court. I think it has been decided that against a purchaser for valuable consideration without notice, this court will not take the least step imaginable. I believe it is decided that you cannot even have a bill to perpetuate testimony against him. I am pretty sure it is determined that no advantage the law gives him shall be taken from him by this court. The doctrine as to the jurisdiction of this court is this: you cannot attach upon the conscience of the party any demand whatever, where he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill. The only doubt I had was as to two exceptions that ought, I think, to have received an answer. There is in them something like a suggestion of spoliation; "that the defendant has not stated whether such settlement was burnt, torn, defaced, obliterated, cancelled, destroyed, disposed of, or made away with, and by whom; and whether that was by the defendant's consent and privity to defraud the plaintiff." Upon looking into the bill there are interrogatories of this nature; but there is no charge or case of spoliation made. These two must therefore follow the fate of the others. The exceptions to the report must be allowed.

MARQUIS OF DONEGAL v. STEWART.

BEFORE LORD LOUGHBOROUGH, C. JUNE 28, 1797.

[*Reported in* 3 *Vesey*, 446.]

THE bill was filed for an account of dealings and transactions between the plaintiff and defendant, charging that the plaintiff employed the defendant to purchase pictures by commission; and that in the course of that employment for many years the defendant practised several impositions upon the plaintiff, and thereby obtained from him several securities.

The defendant by his answer stated that he was a dealer in pictures, and in the course of that trade sold pictures to the plaintiff; and he positively denied that there was any dealing by commission. The plaintiff excepted to the answer, on the ground that it did not set forth the sums given by the defendant for the pictures; and the Master being of opinion that the answer was insufficient, an exception was taken to the report.

Attorney-General,[1] for the exception, cited Sweet *v.* Young, Ambl. 353; Gethin *v.* Gale, there cited; and Jacobs *v.* Goodman, 3 Bro. C. C. 448, n., where the partnership was denied.

Solicitor-General,[2] for the report. In the cases cited it was not necessary that the discovery should be made. The right to stand at all in a court of equity was utterly denied. It was stated that the person making the claim had no debt or no legacy, and therefore had no right to investigate the transactions of that executor. Here is a dealing between the plaintiff and defendant, which is the question in the suit. Supposing it is not a dealing by commission, the court would think it necessary to know the value, and the best criterion, generally speaking, is to know the price paid by the defendant for the pictures delivered by him to the plaintiff.

LORD CHANCELLOR. The price given is no criterion of the value of any commodity, but especially not upon a dealing in pictures. I should

[1] Sir John Scott. — ED. [2] Sir John Mitford. — ED.

open every tradesman's books in London if I was to compel this account upon the allegation that he was dealing by commission. The answer positively denies the species of dealing that would entitle you to an account of the real cost of the pictures. Till you establish that, I should think it very dangerous. The question upon a partnership has been decided in the case of Sir James Cockburn *v.* Sir Lawrence Dundas, where the defendant denied the partnership.

Allow the exception.

PHELIPS v. CANEY.

BEFORE LORD LOUGHBOROUGH, C. JULY 31, 1798.

[*Reported in* 4 *Vesey*, 107.]

THE bill was filed by an executor against the administrators of an intestate, stating that the testator and the intestate had cross demands against each other; and that, upon a balance of accounts, which were unsettled, a large sum was due to the testator. The bill charged that the defendants, as administrators, had possessed assets of the intestate more than sufficient to pay debts, including the plaintiff's demand; and prayed that the defendants might admit assets, or set forth an account by way of schedule.

The defendants by their answer disputed the plaintiff's demand; and contended that, upon a balance of all accounts, a large sum, as they verily believe, would be found due to the defendants.

They further stated that the personal estate of the intestate was, as they believed, more than sufficient for the payment of his debts and all claims upon his estate; but as the plaintiff's demand was not ascertained, they did not admit assets; and they insisted they were not bound to set forth any account by way of schedule, submitting to be examined upon interrogatories, in case the plaintiff's demand should be substantiated, and a balance should appear to be due to him.

Exceptions were taken to the answer for not setting forth the account of the intestate's personal estate, and of his debts.

The Master disallowed the exceptions, and reported the answer to be sufficient to a common intent.

Exceptions were taken to the Master's report.

Solicitor-General[1] and Mr. *Johnson*, for the exceptions. Mr. *Stanley*, for the report.

The exceptions were overruled.

[1] Sir John Mitford. — ED.

RANDAL *v.* HEAD AND OTHERS.

IN THE EXCHEQUER. EASTER TERM, 1661.

[*Reported in Hardres*, 188.]

IN a bill for tithes of conies per custom (*inter alia*) to pay the 10th cony, or the value of it. The defendants by their answer deny the custom, but do not discover how many conies they killed, or the value of them, as the bill requires; to which exception being taken, the court held that a discovery needed not, where there is a full answer given to the thing in demand; and that till that be tried the defendants are not obliged to discover; otherwise any plaintiff might upon a feigned suggestion compel a defendant to discover what writings he has, or what goods or other things whatsoever, upon pretence that he is joint-tenant with him; and so what he has gained by his trade, which would be strangely inconvenient; but where there is no such great inconvenience, as upon a bill against an executor to discover assets upon a bond or debt, there he must answer, though he deny the debt, because it concerns the act of another person, and assets are presumed; nor is there any inconvenience in the case: but in all such cases the court thought it fit that the defendant, if such matter were found against him, should be examined upon interrogatories to discover his knowledge, and so it was ordered, and an issue directed to try the custom: also the demand of tithes of conies being against common right, the court conceived the case for that reason to be the stronger for the defendant.

TAYLOR *v.* MILNER.

BEFORE SIR WILLIAM GRANT, M. R. APRIL 30, 1805.

[*Reported in* 10 *Vesey*, 444, *and in* 11 *Vesey*, 41.]

THE bill stated that the plaintiff was by the defendant Milner introduced to a young lady, his ward, another defendant (Sarah Pyke), in order that the plaintiff might pay his addresses to her; that the plaintiff's proposals were accepted by her; that mutual promises of marriage passed between them; and a memorandum of the terms of the settlement agreed to was drawn up by Milner, and signed by both parties, and also by Milner; that a settlement was prepared accordingly, and a day was fixed for the marriage; but it was prevented by Milner, in collusion with the third defendant Wheeler, with a view to bring about a marriage between the plaintiff and another woman, of whom Wheeler was a creditor, that he might get his debt paid by the plaintiff; and charging improper intentions in other respects; and that the plaintiff intends to bring actions against the defendants. The bill prayed a discovery, to enable him to bring actions against the defendants.

The defendant Wheeler had originally filed a demurrer and answer. The demurrer, according to the statement of counsel, was to so much of the bill as sought to subject the defendant to something so much in the nature of penalty that the court would not compel him to answer; calling upon the defendant to give an account of his transactions with the other defendant, in order to lay the foundation of actions, as the bill alleged, against all the defendants; charging the defendant Pyke with a breach of promise of marriage, and the other defendants with collusion.

The demurrer having been overruled for irregularity, the plaintiff moved for the production of letters mentioned in a schedule to the answer.

Mr. *Richards* and Mr. *Johnson*, for the defendant Wheeler, resisted the motion, on the same ground upon which the defendant had demurred; insisting, upon The Marquis of Donegal *v.* Stewart,[1] and Phelips *v.* Caney,[2] that, though the defendant had answered, he might resist answering further. They also observed that these letters were confidential.

[1] 3 Ves. 446. [2] 4 Ves. 107.

Mr. *Romilly* and Mr. *Hall*, in support of the motion, contended that those particular cases, which were to be considered rather as exceptions out of the general rule, could not protect a defendant from answering fully as to that which he had submitted to answer.

The MASTER OF THE ROLLS. If the question now were, whether the defendant should answer at all, the objection would deserve great consideration. But it is too late now to argue whether, upon the case made by this bill, the plaintiff is entitled to a discovery or not; for there is no difference whether the court has determined that the bill is such as the defendant must answer, or whether the defendant has, by his own conduct, precluded himself from raising that question. It is now determined, that this defendant must answer. That he must answer fully, is a necessary consequence. I take it to have been determined, that if a person, who is only a witness, submits to answer, he must answer fully. This case is different in its principle from those of a total denial of title, where the defendant has not been compelled to give that discovery which was merely consequential. But this plaintiff comes for a discovery of all facts and circumstances relative to this transaction; alleging, that, if fully disclosed, they will lay the foundation of an action at law. The court must say either that there can be no action, and therefore no discovery shall be given, or that the defendant shall give a disclosure of all facts and circumstances relative to what is stated by the bill. It is too late to say, no discovery is to be granted upon any ground. Then it is quite impossible to be contented with an insufficient discovery. The defendant does not say, these letters are irrelevant to the transaction stated by the bill. On the contrary, he says they do relate to it. Then the whole transaction is not disclosed, as long as these letters are suppressed; for they constitute, not something merely consequential, but a part of the very discovery sought by the bill. Is the defendant to judge how much he shall give, and how much withhold? He must give the whole discovery. The objection, that these letters were confidential, is not relied on with any confidence that it can avail the defendant. They may be so; and it may be disagreeable to produce them; but that is determined to be no objection even to a witness giving evidence, still less to a party disclosing that which relates to the very transaction upon which the court has said he must make the disclosure. The effect upon the other two defendants, as to the evidence they may make use of, cannot prevent this defendant making the discovery, if relevant to any part of the case, as against him. He must therefore make this discovery.[1]

[1] The report of this case has been modified by the omission of irrelevant matter. — ED.

DOLDER *v.* LORD HUNTINGFIELD. — ST. DIDIER *v.* LORD HUNTINGFIELD.

BEFORE LORD ELDON, C. NOVEMBER 20, 1805.

[*Reported in* 11 *Vesey*, 283.]

THE bill in the first of these causes stated, that previously to 1798 the magistrates and persons in whom the powers of government of the several Swiss cantons were respectively vested, remitted large sums to their agents in this country for the purpose of being invested in the public funds, and that large sums were so remitted by the governments of the cantons of Berne and Zurich, and the town of Neufchatel, which were part of the public moneys of the said cantons and town respectively, which sums were invested accordingly for the public use of such cantons.

The bill then stated the several funds in 1798 standing in the books of the Bank of England and the South Sea Company, in the names of the Advoyer the Less and Grand Council of the city and canton of Berne, the Burgomaster the Less and Grand Council of the canton or state of Zurich, and the town and citizens of Neufchatel; that prior to 1798 the said cantons of Switzerland were separate and independent states, connected by a certain league; and in that year the several cantons became united and consolidated into one independent state or commonwealth, which assumed the name of the Helvetic Republic, and have ever since remained so united; and from that time the said several states or cantons ceased to exist, and there were no persons answering the description of the former respective governments.

The bill further stated that by a law of the Helvetic Republic, passed on the 12th of March, 1799, it was declared that the property acquired by the then late governments of the said cantons, as representing the sovereignty, was national property; that part of said funds (specifying them) had been assigned by the Helvetic Republic to Antoine St. Didier, of the city of Paris, merchant. The bill then stated the title of the plaintiffs as the Llandamman and two Stathalters of the Hel-

vetic Republic, in whom, by the constitution of the republic, the executive power is vested; and prayed that the defendants, the Bank of England and the South Sea Company, may be decreed to transfer to the plaintiffs, and to pay the dividends accrued; and that the other defendants, the agents, may be decreed to pay the dividends received by them.

The agents, by their answer, admitting the remittances and investment of the money in the funds, &c., and that prior to 1798 the cantons of Switzerland were separate and independent states, connected by a league, stated that in 1798 a revolution took place in Switzerland; and that the said several states and cantons, and among others the cantons of Berne and Zurich, ceased to exist, or to be separate and independent states; and that there was not from the time of such revolution any person in whom the government of Berne and Zurich was vested, or answering the description of "Advoyer the Less and Grand Council of the city and canton of Berne, the Burgomaster the Less and Grand Council of the canton or state of Zurich, and the town and citizens of Neufchatel;" and that they are informed and believe another revolution has taken place in Switzerland, and the powers of government are now vested in different persons from those in whom they were vested at the times when the transactions in the bill mentioned are represented to have taken place. They submitted that the plaintiffs, upon their own showing by their bill, have no title to the relief prayed, or to any account of the dividends from the defendants, and that the Attorney-General ought to be a party.

A similar bill was, in January, 1803, filed by St. Didier, described as residing at Paris, claiming under the assignment; and a similar answer was put in. The Master having reported the answer insufficient in each cause, exceptions were taken to the report. The defendants had, after the expiration of the usual time, applied for leave to demur, which was refused.

Mr. *Richards*, Mr. *Hollist*, and Mr. *Winthrop*, in support of the exceptions, upon the question whether the defendants, having put in an answer, were bound to answer throughout, cited Neuman *v.* Godfrey;[1] Jerrard *v.* Saunders,[2] a case in the Court of Exchequer, upon a bill by a vicar against the occupier, who by answer denied the right of the vicar, but did not set forth the quantity and value, and an exception was overruled; which decision was followed by a late case[3] in the same court.

[1] 2 Bro. C. C. 332. [2] 2 Ves. 454.

[3] Tiffen *v.* Clarke, January 31, 1804. It was a bill for tythes brought by a vicar. The defendants, stating the right to be in the rector, objected by answer to set out the account. Exceptions were taken to this; but they were overruled in full court. Belt's note to Hall *v.* Noyes, 3 Bro. C. C. 487. — Ed.

They also insisted that the bill states no title in the plaintiffs; neither that the new government is recognized by the government of this country, nor that it is the legitimate government; that, though every state may by consent of the sovereign and inhabitants change the form of the government, nothing like force, conquest, or subjugation can give a title in a court of justice: the facts that a French army had entered Switzerland, and gained possession of the country by force after much bloodshed, were so notorious that they may be stated in a court of justice; and under such circumstances it could not be represented that the union took place with the free will and consent of the government and inhabitants, which free will and consent are essential; and the law of the Helvetic Republic was merely declaratory, and could not give the right not given by the union.

Mr. *Romilly* and Mr. *Bell*, for the plaintiffs. The question is, whether these trustees, having admitted that this fund is in their hands, and that they have received the dividends, shall not state what dividends they have received. Upon the general question, whether a defendant may by answer insist that he is not bound to answer, there are many contradictory decisions; but it was never decided that a defendant, having answered as to particular facts, may stop short, and refuse to give any further answer as to the circumstances attending those facts. The proposition is most material. Great inconvenience would follow from receiving the objection at the hearing instead of by plea or demurrer. The party may die; and the whole benefit of the suit may be lost by not compelling the defendant to answer in the first instance. Shall the party take the benefit of the delay? What recompense can the court make to the other party, in whose favor the decree is at last made, the object of the discovery being completely gone?

The result of all the decisions is, that where a defendant has submitted to answer, he is bound, unless in some particular case, to answer fully. As a general proposition, where the bill is filed for relief and discovery, if the defendant submits to answer, he is bound to answer fully, unless from particular circumstances he can show something exempting him from the general obligation to answer. There are two excepted cases, proving the rule: 1st, where the discovery tends to criminate the person from whom it is sought. That is so fundamental a rule of the law of this country, that equity, interfering to prevent the application of the general law to work injustice, will not interfere against that rule. The other exception is a purchase for valuable consideration, where by accident, perhaps negligence, the plea is defective in form, and the whole relief is substantially obtained by the discovery; upon which the plaintiff may go to law. In Gethin *v.* Gale,[1] Lord

[1] Stated in Sweet *v.* Young, Ambl. 854.

Hardwicke was struck with the hardship of the case, and distinguishes it from the case of a creditor or legatee. The cases that followed are Neuman v. Godfrey,[1] Cartwright v. Hateley,[2] Shepherd v. Roberts,[3] Hall v. Noyes.[4] The court cannot in every case judge of the materiality. Jacobs v. Goodman[5] has always been pressed; upon the argument, that in this way any man might compel the first mercantile house in London to account. That argument has always been disallowed by Lord Thurlow, though it had weight with the Court of Exchequer in that case, and was in a subsequent case taken up by Lord Rosslyn. Selby v. Selby;[6] Jerrard v. Saunders.[7] The Marquis of Donegal v. Stewart,[8] and Phelips v. Caney,[9] are the only cases, besides Jacobs v. Goodman,[10] in which the defendant was held not bound to answer fully, and no reason is given, except in Jacobs v. Goodman, which goes upon the hardship in the case of a partnership. That case might be met by a plea, which is not confined in time, as a demurrer is. The books and papers would furnish the strongest evidence whether there was a partnership or not; and the strongest inference arises from declining that production. This would lead to an examination of the propriety or impropriety of the discovery in every case. In the Marquis of Donegal v. Stewart there was no inconvenience in compelling the defendant to discover the prices of the pictures; but there was great inconvenience the other way, — the very object of the bill being to detect the imposition. Suppose, in Phelips v. Caney the defendant had admitted that £100 was due, and that he had assets for that: upon the particular statement of the bill perhaps that answer would have been sufficient; but if it is to go beyond that, it directly overrules what Lord Hardwicke says as to a creditor and legatee in Gethin v. Gale, — that they are entitled to an account, which must suppose a debt or legacy disputed. The result of all the authorities, from Sweet v. Young[11] down to Jacobs v. Goodman, is, that the defendant must take advantage of his situation by plea or demurrer; and in Jacobs v. Goodman the court appears to have been struck with the argument, that in this way bankers might by the suggestion of a partnership be compelled to set forth all their accounts. These defendants do not put themselves upon the point that they are in such a situation that they are not bound to answer; but admitting that to a certain extent, as to the funds themselves, they must answer, insist that they will stop short; and refuse to go into the particulars.

It is objected that the bill should state either that the new govern-

[1] 2 Bro. C. C. 332. [2] 3 Bro. C. C. 238, 1 Ves. 292. [3] 3 Bro. C. C. 239.
[4] 3 Bro. C. C. 488. [5] In the Court of Exchequer, 3 Bro. C. C. 487, n.
[6] 4 Bro. C. C. 11. [7] 2 Ves. 454. [8] 3 Ves. 446. [9] 4 Ves. 107.
[10] In the Court of Exchequer, 3 Bro. C. C. 487. [11] Ambl. 353.

ment is recognized by the government of this country, or that it is the legitimate government of the country. That argument is not conformable to the rules of pleading in this court. It is not necessary in a bill for an annuity to state that all the circumstances required by the act of Parliament have been complied with, or in a bill to carry an agreement into execution, to state that it is upon the proper stamp. Those circumstances are assumed, unless the contrary appears.

The remaining question, whether it is necessary that the government of this country should have recognized the new government of Switzerland, is a most important consideration as to the legal doctrines and the political consequences it involves; viz., whether, when a foreign government has invested money in the funds of this country, upon the faith of our government, merely on account of some constitutional alteration, however inconsiderable, in the form of the government of that country, the British government has a right to say, the money so invested belongs to them, and not to the government of the country by which it was invested. That is an extraordinary proposition. Suppose, previously to the union with Scotland, the British government had money in a foreign bank, could the government of the country in which that money was invested have claimed it on the ground that the union was not recognized by that government? The same case might have arisen upon the Revolution of 1688. As to the plaintiff in the second cause, they ought to have pleaded that he was an alien enemy; a plea held to great strictness both in law and equity. The bill states only that he was residing at Paris in 1803; upon which ground several of his majesty's subjects might be considered alien enemies.

Mr. *Richards*, in reply. Upon the question of pleading there is certainly great want of uniformity; and the late authorities are in favor of the defendant. Jacobs *v.* Goodman,[1] Jerrard *v.* Saunders,[2] The Marquis of Donegal *v.* Stewart,[3] and Phelips *v.* Caney.[4] In Gunn *v.* Prior, which is not in print, the bill was filed by a person claiming as heir-at-law. A plea that he was not heir was disallowed. Then an answer was put in, insisting that the plaintiff is not heir. Upon exceptions to the report as to the sufficiency of that answer, Lord Kenyon, sitting for Lord Thurlow, held, that if the plaintiff was the heir, he was entitled to all the discovery sought by the bill; if he was not the heir, he was not entitled to any discovery; that therefore the preliminary fact must be ascertained; and an issue was directed upon this principle, that, if an allegation is made by the defendant of a fact destroying the plaintiff's title, whether it is by way of plea or answer is immaterial. In either case that must be first decided. Selby *v.*

[1] 3 Bro. C. C. 487, n.
[2] 2 Ves. 454.
[3] 3 Ves. 446
[4] 4 Ves. 107.

Selby[1] was a different case; for there was a devise to Lowndes in case no heir should appear within a year. He was without doubt the acknowledged devisee, and took possession; and the year elapsed long before the bill was filed. A bill of discovery was filed by Lowndes; and Lord Chief Baron Eyre said, that bill must be answered in all its parts. The case of Cookson *v.* Ellison,[2] which really cannot be considered as a decision, has had great influence in all these cases. As to Jerrard *v.* Saunders,[3] upon what ground is that an exception to the rule? Why is not a purchaser as much bound to answer as any other person? The discovery is not relief, but merely ancillary; the allegation being, that the defendant holds deeds belonging to the plaintiff, as the estate belongs to the plaintiff. If the plaintiff could prove that the defendant has the title-deeds, he would be entitled to a decree for them without putting the defendant to answer. A bill to carry an agreement into execution does not aver that the agreement has been stamped, as, though not stamped, it is not the less an agreement. It is enough if it is stamped even during the hearing. It is not necessary to state that an annuity has been duly enrolled, as without enrolment there is no grant giving the party a title to sue as an annuitant. The circumstances of this case are now matter of history.

The LORD CHANCELLOR. You would be obliged upon an indictment for a libel to prove that France is now at war with Austria; not as to the war with this country, the courts taking notice of that with reference to our own country.

Reply. Such a body as this, not acknowledged by this country, is not entitled to sue in the municipal courts of this country. The comparison to the union with Scotland does not hold. This country, with its government by the King and Parliament, still continued the same, with that accession. There was not an end or dissolution of the nation, as a nation. Upon the Revolution in 1688 the Constitution remained precisely the same, with the change only of the King, a part of the legislative sovereignty of the country; the supreme power being in the King and Parliament. This is a total dissolution of the country; not merely the introduction of a new chief magistrate into the same country that reposed this confidence in these defendants.

The LORD CHANCELLOR. It is not necessary to make any observations upon the cases that have been cited. I remember it struck Lord Thurlow, who endeavored to decide upon questions of pleading with analogy to the law, as extraordinary, that, if there are settled modes forming the practice, according to which a defendant is to proceed, there could be a deviation from them. The practice required a demur-

[1] 4 Bro. C. C. 11. [2] 2 Bro. C. C. 252. [3] 2 Ves. 454.

rer within a given time, or the defendant could not demur alone, but must have applied for leave to plead, answer, or demur; not demurring alone. Most of the cases that have been stated are distinct from this; for in those cases, taking the bill to be true, neither the plaintiff nor the defendant had any doubt that the plaintiff was entitled to relief. For instance, where a partner prays a partnership account, if the partnership is admitted, the relief follows. So, where the plaintiff is admitted to be a creditor or legatee, the bill sustains itself against any thing suggesting that no relief is due. But cases in modern times have said, that, if the defendant denies some substantive fact which, if admitted, would give relief, until the truth of that fact is disposed of, no further answer shall be compelled. Many topics of great weight must be disposed of, when that case comes to be decided, if it is still open. The court has got to a species of plea, which is neither a plea, answer, or demurrer, but a little of each. The consequence is, that the commission must go to a number of facts instead of one, as in the case of a plea. The late cases, as far as they are authorities, as to which I say nothing now, establish this: that if the bill is both by the plaintiff and the defendant allowed to give a right to the relief, if true, the defendant, not demurring, not denying by answer the title to relief upon the bill, but negativing one fact positively, says, the court, if they will take that fact not to be true, ought not to call for an answer. In order to make those cases authorities for the defendants, they must say, that, taking the case made by the bill to be true, they deny some leading fact. But that is not this case.

The principle upon which I dispose of this question upon the Master's report, is not connected in any degree with the merits of this cause. The question of merits is not decided by the Maryland case,[1] which does not touch such a case as this, — a foreign independent state. That state was only a corporation under the Great Seal, dissolved by means which a court of justice was obliged to consider rebellious; and then the transfer of the title from the State of Maryland to any other state was a question a court of justice could look at, as a question of law, only in one way; and the principle was that the court could not admit that the title passed to the independent states of America by an act which we were obliged to call rebellion. What national justice was to do, after national policy had arranged the relative situation of the countries, was to be decided, and was decided, elsewhere. This is perfectly different. No civil offence has been committed against this country by the dissolution of the former government, or the arrangement of the present government, in Switzerland. The question is,

[1] Barclay *v.* Russell, 3 Ves. 424.

therefore, to be discussed upon great principles of the law of nations, without attending to the situation of the defendants as subjects of this country. If it is true that the plaintiffs have shown that they have no title whatever to the relief (for that is the proposition), the rules of the court require a demurrer, before the defendant comes here to ask for time to plead, answer, or demur, not demurring alone. The proposition is extraordinary, that a person, in a situation in which he must answer, and may, and is sometimes called upon to state the want of parties, can say, that, as the suit hereafter cannot be effectual for want of parties, he will not answer at present. I do not understand the principle of that. I do not say whether the Attorney-General is a necessary party.

The defendants applied for leave to demur alone, having got themselves into a situation in which they could not do that. Then the answer is quite new in this respect, that the defendants, not being allowed to demur to the discovery or the relief, will discover what they please, and refrain from discovering the rest, putting in an answer that objection both to the discovery and relief, which ought to have come by demurrer. Upon that ground, refusing this, I cannot be said to shake any of those decisions.

As to the question whether, if a new State was to arise in Europe, a court of justice is to take notice of it, if it does not appear by averment on the record, or upon an allegation, according to information and belief, that a revolution has taken place; first, those last words are too loose; secondly, it is not easy to decide what a revolution means in a court of justice; for when a sovereign and the whole nation give their individual consent to the change, that is in a sense a revolution. There is another sense of that word much more grievous. But I do not know that I can give a legal construction to such a word, unless a sense has been put upon it by authority in this country. My opinion is, that these defendants must answer.

There is no difference in the other case, except that the objection ought to come in a different form, with the observation that it is too much for me to suppose that the title made by the former government would meet with no attention from the present government.

Exceptions overruled.

FAULDER *v.* STUART.—STUART *v.* FAULDER.

BEFORE LORD ELDON, C. DECEMBER 7 & 9, 1805.

[*Reported in* 11 *Vesey*, 296.]

THE bill in the first of these causes stated a purchase in 1799, by the defendants Daniel Stuart and Thomas George Street, from John Parry, of the property and copyright of "The Courier" newspaper, in consideration of an annuity of £400; that in 1801, Street, in consideration of £500, sold a moiety of his share to the plaintiff Faulder, who, in 1804, assigned that share to the other plaintiffs, Bosanquet & Co., upon trust to secure the balance of his account with them as bankers; and prayed an account of the profits of the paper; and that the defendant Stuart may be decreed to pay one-fourth part, &c., according to the assignment.

The defendant Stuart, by his answer, stated the circumstances of his original connection with Street in publishing the paper; that the annuity to Parry was made redeemable upon payment of £4000, and, as to a moiety, £2000; that certain conditions were agreed upon between them; one, that all the profits should be applied to the redemption of the annuity; that Street was to subsist on a salary; that, to prevent the introduction of any improper person, it was agreed that neither should sell until an offer made to the other; and it was understood and agreed that each was to have the option of purchasing upon the terms any third person would give. The answer then stated that all the purchase-money is now paid, and the annuity redeemed, and all accounts between the defendants settled to the 13th of April, 1804, with several other circumstances; that the defendant had no notice of the assignments to the plaintiffs until May, 1804, and not from them until June; that he believes the plaintiff privately received money from Street on account of the paper; that the defendant has received different sums of money on account of the paper since the 27th of January, 1804; and he insists Street had no right to sell until he had made an offer to the defendant; that Street never did make

that offer. The defendant therefore insisted upon the agreement, and that Faulder could not purchase, nor Street sell, except subject to the equity under which he held; and claimed to be entitled to an assignment of the share upon the terms under which Faulder purchased; and that it is immaterial whether the plaintiffs had notice of the particular terms of the agreement between the defendant and Street; but, under the circumstances, it must be presumed they knew Street could not assign without leave of the defendant, and unless he declined to purchase. The answer further suggested that the plaintiffs had not made the affidavit required by the Stat. 38 Geo. 3, c. 78, upon a change of the property in a newspaper; and, therefore, the assignments, being made fraudulently, and kept concealed, are void; and insisted that for the reasons aforesaid the plaintiffs have not any right to compel this defendant to come to any account for the profits of the said concern, or set forth any account of his receipts or payments on account thereof.

Exceptions were taken to the answer for not setting forth what profits had arisen since the 27th of January, 1804; and whether the defendant had not received and converted to his own use the whole, or part; and for not setting forth an account of the money accrued or received since the 13th of April, 1804, on account of the profits.

The Master reporting the answer insufficient, the defendant took an exception to the report.

The second cause was instituted against the plaintiffs in the other cause. The bill stated the same sort of case as the answer to the other bill; and charging notice of the agreement, that Street should not sell his share without offering it to Stuart, prayed a declaration that Street had no right to part with his share without previously offering it to the plaintiff; that the plaintiff is, therefore, entitled to the benefit of the purchase by Faulder; that an account may be taken accordingly of the consideration paid, and the money received on account of such share; and that the partnership may be dissolved.

The answer of Faulder made the same case as his bill; and stated that he did not know that it was understood and agreed that neither party should sell his share without offering it to the other, &c.; that the whole purchase-money for "The Courier" has been paid; the annuity redeemed; and all accounts between the plaintiff and Street settled up to the time mentioned in the bill. Upon the assignment to the defendant, Street requested that the transaction might be kept secret from the plaintiff, as it would lessen Street's influence with him. The defendant therefore kept it secret until June, 1804; when he, upon Street's absconding from his creditors, informed the plaintiff that he was the proprietor. He admitted he had received from the defendant Street divers

sums on account of the said fourth share of the profits of the said concern since the date of the assignment to the defendant; and he received such sums previously to June, 1804, without giving the plaintiff notice of the assignment for the reason before mentioned. He denied that when the assignment was made, or when he paid his purchase-money, he knew or suspected that it was part of the agreement between the plaintiff and Street that Street should not sell without leave of the plaintiff, or first offering the share to him. The defendant was first told of it by the plaintiff upon the 15th of June, 1804, after informing the plaintiff of the assignment to the defendant. He submits he is not obliged to answer and set forth when, and where, and by whom, and to whom, and how, and in what manner, such consideration of £500 was paid or given; such consideration never having been in any manner disputed or questioned by Street, who was alone concerned therein. He stated that he has received divers sums on account of the said fourth share; but submits that he is not obliged to set forth any account of the sums so received at the instance of the plaintiff, being merely a pecuniary transaction between this defendant and Street, in which the plaintiff is not interested; and he submits he is not obliged to set forth the particulars of the demands of the other defendants (the bankers), upon which they claim to hold the security of his fourth part of the paper; nor whether the indentures of the 10th of February, 1801, and the 27th of January, 1804, and the letters and notices by the plaintiff to the defendant, or books of accounts, papers, &c., relating to the advancement of the consideration for the assignment to the defendant, and the money he has received on account thereof, are in his custody; or to set forth the schedules, &c.

To this answer exceptions were taken; first, that the defendant has not answered when, where, by whom, and to whom, the consideration of £500 was paid.

Secondly, that he has not answered whether he and other defendants (the bankers), or any, and which of them, have, or have not, received any and what sums of money on account of the fourth share, &c., nor an account of all and every sums of money received by them or any of them on account thereof; and whether with the privity of the plaintiff.

Thirdly, that he has not set forth the particulars of the demands of the bankers upon the defendant, &c., and how those demands are made out.

Fourthly, that he has not set forth whether the indentures of 1801 and 1804, and the letters and notices sent to Street and the other defendants, &c., books of account, papers, &c., relating to the advancement of the consideration which the defendant Faulder alleges to have

been paid for the assignment to him, and the money which he or the other defendants, or some of them, have received on account thereof, &c., or any and which, &c., are in the custody of the defendant; and that he has not set forth the schedules, &c.

The Master[1] having reported the answer sufficient, the plaintiff took an exception to the report.

Mr. *Romilly* and Mr. *Bell*, for the defendant in the first cause, plaintiff in the second, in support of the exceptions, upon the general question referred to the argument in the case of Dolder *v.* Lord Huntingfield,[2] relying on the case of Jacobs *v.* Goodman.[3] Upon the particular circumstances of this case they insisted that Stuart was not bound to answer until it appears that there has been a legal assignment, and that the plaintiff is entitled to an account. They also relied upon the objection that no notice was given, as required by the act of Parliament, and observed that the grounds upon which the defendant insists he is not bound to answer, do not appear upon his bill; but it is necessary to state them by the answer; that it is very difficult to say how this defence, though a complete answer to the relief, could be stated by a plea; the defence consisting of a great number of facts, not of one short fact that might be pleaded, or of a combination of facts involving one point.

Mr. *Richards* and Mr. *Thomson*, for the plaintiffs in the first cause, defendants in the second, insisted that the answer of Stuart had gone so far that it must of necessity go farther; the defendant admitting that he has received money on account of the newspaper, ought to set forth what he has received. The late cases, which are certainly new, and have broken down the old rule, are not applicable. This is not a single denial of the plaintiff's title, as, that he is not a partner, &c.; but the answer states a variety of facts, and inferences from them, which are offered to the court as reasons why the defendant should not answer further, having answered to a considerable extent, as far as he finds it convenient. Lord Thurlow strongly marked the nature and office of a plea, stating some one specific fact, or a variety of circumstances ending in one specific fact, upon which the right to the discovery is put, and issue is taken upon that fact. But in this course the court is called upon to decide upon the effect of all these circumstances without evidence, which shows the mischief and inconvenience of this new practice that has crept in.

The Lord Chancellor. Upon the exception in the latter of these causes the only question is, whether the answer of the defendant to these points is material to the matters in issue. It all depends upon this,

[1] The answers were referred to different Masters.

[2] 11 Ves. 288.

[3] In the Court of Exchequer, 8 Bro. C. C. 487, n.

whether there is such a charge in the bill as to the payment of the consideration as entitles the plaintiff to an answer, not only whether it was paid, but as to all the circumstances, when, where, &c. I have always understood that general charge enabled you to put all questions upon it that are material to make out whether it was paid; and it is not necessary to load the bill by adding to the general charge that it was not paid, that so it would appear if the defendant would set forth when, where, &c. The old rule was, that making that substantive charge you may, in the latter part of the bill, ask all questions that go to prove or disprove the truth of the fact so stated.

As to the other exceptions, I have looked into all the cases that were cited in Dolder *v.* Lord Huntingfield, and it will be a very painful and difficult duty, when the court is called to it, to say which of the various and discordant opinions expressed by Lord Thurlow, Lord Kenyon, Lord Rosslyn, and Lord Chief Justice Eyre, is right. But there is no way of putting this case in which it can be held that the Master is wrong; for, if the point intended to be stated by the answer is right, stating it thus, that they meant to be joint proprietors, that verbally, or otherwise (it is not material), they agreed that no sale should take place without the consent of the other, without an offer of the interest to him at a price to be named by a third person, and that the person who has purchased had distinct notice of that agreement; if that either by plea or answer would protect the defendant from answering further, it must at least be brought forward by the answer as distinctly and positively as if it had been pleaded. This is without prejudice to the decision to be made, when it shall be necessary, upon this point; for upon some of the authorities it will be found very difficult to say that nothing can be pleaded in this court but some fact *dehors* the bill. I think, without going through the cases of purchasers for valuable consideration, and others, a plea has been permitted of some facts, which were only a negative of some circumstances stated by the bill. But this answer is not a positive assertion of any thing, leaving the court to determine, whether in the shape of answer or plea, upon the truth of the facts; but it is all argumentative, and has some arguments that I think cannot be maintained. There is not positive averment enough. Therefore overrule the exceptions in the first cause, and allow the exception in the second. The principle I go upon is, that, if they had not answered, but had pleaded in the terms in which they have answered, the plea must have been overruled.

SHAW v. CHING.

BEFORE LORD ELDON, C. DECEMBER 10 AND 11, 1805.

[*Reported in* 11 *Vesey*, 308.]

UPON exceptions, the same question was made as in the preceding cases, Dolder *v.* Lord Huntingfield [1] and Faulder *v.* Stuart.[2] But the point was not determined, the Lord Chancellor being of opinion that it did not arise.

Mr. *Fonblanque* and Mr. *Martin*, for the defendant, to whose answer the exception was taken, referred to the arguments and the authorities cited in Dolder *v.* Huntingfield and Faulder *v.* Stuart; observing that this defence could not be made by plea, not partaking of the nature of a plea in any respect; being, as to this point, an alleged agreement between the plaintiff and the other defendant for a share of the profits of the business, — a mere negation of the averment in the bill, which, wherever it can be by plea, must be something that goes to the person, as, if the party is executor, &c., and must be in bar of the whole demand, which is not this case; and the fact, not being in the immediate knowledge of this defendant, is denied according to his information and belief. The case of tithes has been considered anomalous.

The LORD CHANCELLOR. Not always. The first case is that upon the tithe of rabbits.[3] The difficulty of that was, that, if the parties had gone to issue upon the cause in equity, and the cause had come to a hearing, it might have turned out that no issue would have been granted. They found then this inconvenience: that, if by a *modus* the defendant set up a defence against setting forth what tithable matters he had, the party might die before the account could be obtained. Then that case goes on to state the case of the executor, who, though he denies the debt, must answer as to an account of assets upon a creditor's bill. When you reason upon the case of Child's shop, suppose a bill filed by a person claiming as creditor, and the debt denied; they must either, according to the modern doctrine, have paid the debt,

[1] 11 Ves. 283. [2] 11 Ves. 296. [3] Randal v. Head, Hardr. 188.

or they must have set forth the account. That case, therefore, is just as inconvenient as the case of partnership.

In the case of Gethin v. Gale,[1] Lord Hardwicke is represented to have said what cannot be, — that, if the right is clear, the defendant shall set forth the account; if not clear, he shall not; and then he adds that exception as to the bill of a creditor or legatee. In the subsequent case[2] the Court of Exchequer says, that depended upon the fact of legitimacy, as to the right to the account; and in some form the mother swore positively to the legitimacy of the party; and Lord Chief Baron Parker is made to say, that, as it was sworn positively, and was in the knowledge of the party, that fact was disproved that would give the right to the discovery; but he proceeds to say, that, if it was not in the knowledge of the party, they would compel the discovery; and they did in that case compel the discovery.

Then followed all the cases before Lord Thurlow, not only as to the discovery, but in what mode it was to be obtained; and that brings forward the other question, — whether you may not by a plea bring forward only a negation of the circumstances stated by the bill. The case of a purchaser for valuable consideration comes very near that. If this doctrine is to be maintained, which is positively asserted in some of the cases, and denied in others, it is necessary to determine in what form this is to be done. A case of partnership is stated, praying a great variety of accounts, and stating several circumstances of fact. The defendant does not put in a short answer, or try the effect of a plea of no partnership, but puts in an answer, stating that there is no partnership, refusing to answer what is inconvenient to him to answer, but answering all that is convenient. Where a party demurs, judgment is had in the first instance: so upon a plea; but if this sort of illegitimate pleading can be substituted, the suitor is thus involved: 1st, he is put to the expense of the judgment of the Master; and the Master is called upon to give judgment in a matter which, with the exception of the case of pain, penalty, and forfeiture, it is not the habit of the court to intrust to them: 2dly, if the defendant by plea puts in a single fact, or several facts, constituting one defence, they go to issue upon that: if it is found for the defendant, the plaintiff is dismissed; if for the plaintiff, further inquiry is directed. But in this way, the defendant answering just what he chooses, issue cannot be joined upon the single fact, supposed to be the bar, but the plaintiff, if he replies, must reply to the answer as he finds it, and must go to long, expensive proof upon a great variety of facts, which is an unnecessary, vexatious burden thrown upon him. Lord Thurlow seems to

[1] Cited Ambl. 354. [2] Sweet v. Young, Ambl. 358.

have thought that if a defendant answers, he shall answer throughout. Whether that is right or not, I am convinced the forms of pleading cannot stand as they now are upon the reported cases.

I will read the bill and answer, as I did in the other cases, upon this distracted point; for, though I must not shrink from it, yet, out of respect to those who have differed so much, I ought not to decide it in a case in which it does not arise.

December 11.

The LORD CHANCELLOR disposed of the exceptions, saying it was clear this answer did not involve the general point.

ROWE v. TEED.

BEFORE LORD ELDON, C. NOVEMBER 25, AND DECEMBER 6, 12, AND 21, 1808.

[*Reported in* 15 *Vesey*, 372.]

THE bill in this cause prayed an account of the produce of prizes captured by the Lord Nelson privateer, the plaintiff claiming as part owner entitled to one-third. A plea having been overruled, one of the defendants put in an answer, alleging various circumstances as to the title to the ship and her earnings; stating, that, though the plaintiff had agreed with the former owner for the purchase of one-third, no bill of sale was executed; admitting, however, in another part of the answer, that the ship was registered in the names of the plaintiff and the defendants; stating, that the ship made several captures between the 14th of January and the 12th of June, 1805, and afterwards, some of which were restored; that on the 12th of June the plaintiff agreed to sell his share of the ship and prizes to the defendant and another person, in whose names a new registry was made; with various allegations as to the consideration and other circumstances attending that transaction; and giving an account as to the prizes captured between the 14th of January and the 12th of June, 1805; insisting that he was not bound to set forth an account as to the period during which the plaintiff was not an owner.

The Master allowed exceptions to the answer; and an exception to the report was taken by the defendant.

Mr. *Richards*, Mr. *Benyon*, and Mr. *Bell*, in support of the exception to the report.

There is no case upon this question, which has been so much discussed, that resembles this precisely; this plaintiff not stating by his bill a complete title, without proving something more than he has alleged, the allegation being only sufficient to introduce the proof; but the plaintiff does not state the fact that a bill of sale was executed to him. The defendant avers that no bill of sale was executed to him, and then his title fails. The whole turning upon a single fact, the

rule, according to Lord Kenyon in the case of Gunn *v.* Prior,[1] applies; and it would be extraordinary, the whole turning upon a single fact, sworn to by the defendant, if the court should impose upon him the burden of setting forth a long account, of which, taking that fact to be true, no use can be made. The plaintiff's title, as partner, from January to June, 1805, is admitted; and in that period the account is set forth, the defendant insisting that from June the plaintiff had no title. This case, arising upon a claim of partnership, resembles Jacobs *v.* Goodman.[2] The case of a purchase for valuable consideration, without notice, is an admitted exception; in which case the inconvenience may not be by any means so considerable as in this. The question in this case is no less than this: whether any man, upon the mere suggestion of a partnership, may inquire into all the affairs of the first mercantile house in London. The court, pressed with the weight of such an inconvenience, will follow the decisions, that a denial of title is an exception to the general rule.

Sir *Samuel Romilly* and Mr. *Johnson*, for the plaintiff. The Master's report, that this answer is insufficient, is right; but the general question, upon which the decisions are in opposition, does not arise; viz., whether, the bill seeking a discovery of accounts or facts to which the plaintiff represents himself to be entitled as standing in a certain relation to the defendant, the latter, denying that relation, yet is bound to give the discovery. This case is not put upon a single point, the defendant, by a very long and complicated answer, tendering several issues upon a variety of facts perfectly distinct. The result is, that for a certain period the plaintiff would be entitled to an account; then reasons are given for concluding that nothing would be produced by that account, viz., that the prizes taken during that period were restored; and then the defendant states an equitable agreement by the plaintiff to assign his share to the defendant. All these facts are stated with great detail, and with a variety of circumstances. If any doubt could be entertained upon those cases where the short point was, whether the plaintiff was partner or not, that circumstance is decisive against this defendant. This answer cannot be considered in a more favorable light than a plea; and if this had been put in the shape of a plea, it would have been overruled by the discovery that is made.

The Lord Chancellor. One difficulty in this case is, that, as this record stands, the court must suppose it possible that the plaintiff will prove that he was once an owner of this ship, and then there is nothing to take away his right; the defendant stating nothing that shows he has acquired the title since June, the plaintiff, if he ever had it, has not been deprived of it.

[1] Stated in 11 Ves. 290, 1. [2] In the Court of Exchequer, 8 Bro. C. C. 487, n.

Another difficulty upon this point has always embarrassed me. The case of a bill, stating a parol agreement for the purchase of an estate, with a part performance, was under very singular circumstances, until it was settled here[1] that the defendant might take advantage of the statute[2] by his answer, admitting the agreement. Until that was so settled, the answer admitting the agreement, it was immaterial whether the acts, alleged to have been done in part performance, were denied or not, as the agreement, being admitted, must have been performed. If, on the other hand, the defendant, answering as to the acts of part performance, insisted that he was not bound to answer whether there was a parol agreement or not, those acts would not do, unless there was an agreement to which they could be referred. If, then, the plaintiff could not extract from those acts of part performance what was the agreement, or obtain an admission of the agreement, what was to be done with the record in that state of circumstances? I never could get over that difficulty. There is a further difficulty in this case; that the plaintiff might, at the hearing upon a full answer, waive his right to an account, and claim the money admitted to be due.

December 21.

The Lord Chancellor. The answer which has been put in to this bill is drawn with a view to meet the difficulty that arises out of the various conflicting authorities which are to be found upon this point. Various facts are stated, upon each of which issue might be taken, and the answer upon the whole amounts to this, — a denial of the general allegation in the bill, that the plaintiff is a part owner of this ship under the alleged agreement for the purchase of a third share, by the averment that no bill of sale was executed to him; the admitted fact of the registry in the names of the plaintiff, the defendant, and the other part owner, that registry made upon their oaths, being utterly inconsistent with that allegation. Having, however, stated that one short fact, that no bill of sale was executed, without which the property could not pass, — which fact, if proved to be true, would put an end to the suit, — the answer does not stop there, and refuse the discovery and relief, but proceeds to consider the truth or falsehood of that allegation, as a fact fairly put in issue in the cause; stating, that the ship made several captures between the 14th of January and the 12th of June, 1805; what became of some of the prizes; that after the 12th of June more prizes were condemned; and that some, captured before and since that time, were restored. The answer, therefore, does not consider that allegation, that no bill of sale was executed to the plaintiff, as an allegation that ought to preclude all further discovery and

[1] See Cooth v. Jackson, 6 Ves. 12. [2] Stat. 29 Char. 2, c. 3.

the relief; treating it as no more than a single fact put in issue. The answer then states that the plaintiff, who is represented as not being an owner, agreed upon the 12th of June to sell all his share of the ship and the prizes to the defendant and another person, which, according to the former part of the answer, amounts to nothing in law, as there is no averment here that the owners had parted with the interest by means competent to devest it. The answer then states various circumstances as to that transaction of sale, which, upon the face of the answer, was incomplete.

The question is, whether this is an answer bringing forward such one short fact, or such a series of circumstances establishing in the result one fact, that would be an answer to the prayer of discovery and relief; and therefore, whether this is a case in which the court should decide that point which has been long the subject of litigation, — to what extent a defendant is bound to answer, who has averred a circumstance which, if truly averred in another form, and sufficiently proved, would be an answer to the whole prayer for discovery and relief. I repeat that I should not shrink from the decision of that question, if it was fairly before me; and I should be relieved from the apprehension of an erroneous judgment by the reflection, that it is much better that there should be a decision than that such a point should remain in uncertainty. It is not my purpose on this occasion to repeat all that is to be found upon this subject in the late cases; but I must repeat that, whenever this question comes to a decision, it will be infinitely better to decide that in this court the objection should be made by plea rather than by answer. In the Court of Exchequer exceptions come before the court in the first instance. That is not the course here. The office of a plea generally is, not to deny the equity, but to bring forward a fact which, if true, displaces it; not a single averment, as the averment in this answer that no bill of sale was executed, but perhaps a series of circumstances, forming in their combined result some one fact which displaces the equity.

There is this difference between law and equity, that here, for the sake of conveyance, that is, of justice, the denial of some fact alleged by the bill, in some instances with certain averments, has been considered sufficient to constitute a good plea, though not perhaps precisely within the definition of good pleading at law. If each case is to be considered upon its own circumstances, it is desirable that this point should be brought before the court by plea rather than by answer, as an answer *prima facie* admits that the defendant cannot plead; and with the exception of the cases in which it is settled, as general law, that the party is not to answer a particular circumstance, as, that he is not to criminate himself, the case of a purchaser for valuable consider-

ation, &c., this court does not trust the Master, generally, with the determination how much of the answer, considered as a plea, would be a good defence. The Master is, therefore, almost under a necessity of admitting an exception; and when the propriety of his judgment comes to be argued here, it would be most incongruous that the court, admitting his judgment not to be wrong, should yet give a different judgment, considering the answer as a plea.

Another circumstance deserving attention is the great difference of expense in bringing forward the objection by plea rather than by answer. There is but one more material general observation to be added to those which are to be found in the cases reported, — that generally, admitting there are exceptions, the practice of this court requires that the bill and the answer should form a record, upon which a complete decree may be made at the hearing. If, for instance, this plaintiff is a part owner of the ship, he has a right to an answer that will enable him, if a certain sum is admitted to be due, to obtain a decree for that sum, if he is satisfied with that, and does not desire an account.

With that general observation, in addition to those to be found in the other cases, I conclude that this is not a case in which I can say there is one clear fact, or such a combination of facts, giving, as the result, one clear ground, upon which the whole equity of this bill may be disposed of. First, it is very difficult upon this answer to say there is a positive affirmation that there was no bill of sale. Next, it is argumentative: "you were not owner in January, 1805; but, least it should turn out that you were, I give to such an extent as I think convenient the account of the ship's transactions up to June, at which time, if you were an owner before, you ceased to be so;" and that allegation, under which he limits the discovery, and refuses to treat the plaintiff as owner after the 12th of June, 1805, is made upon a supposition inconsistent with the statement that accompanies it. Upon the whole, this is a case much too complicated upon the facts stated in the answer to form the case in which I should pronounce that new doctrine that is to settle the practice with reference to this point. As to the argument of convenience or inconvenience which is to be found in these cases, this defendant, considering what his transactions have been, has no great reason to complain of the inconvenience, if it should prove more considerable than, upon the circumstances, there is reason to apprehend, of making the further discovery. I decide this case, however, not upon the special circumstances, but upon the general ground afforded by the answer taken altogether.

The exception to the Master's report was accordingly overruled.

SOMERVILLE v. MACKAY.

BEFORE ELDON, C. FEBRUARY 12, 1810.

[*Reported in* 16 *Vesey*, 382.]

THE bill in this case represented that the plaintiff, having been engaged in a partnership for manufacturing muslins and piece goods at Glasgow, which partnership was dissolved in 1794, entered into a treaty with the defendant, who lived in London, for shipping goods and executing orders to Russia upon their joint account, charging that to be the effect of the letters that passed between them in March, 1795; and that upon the conclusion of that treaty it was expressly understood and agreed that neither of them should send any goods upon their separate accounts to Anderson and Co., or to any other person in Russia. The bill accordingly, upon the foundation of the contract contained in the letters referred to, prayed that the plaintiff may be declared entitled to a moiety of the profits of all goods sent by the plaintiff and the defendant, or by the defendant separately, to Russia, consigned to Anderson & Co., or to any other person; and that an account may be taken accordingly of all goods sent upon the joint account, or by the defendant upon his private account, to Anderson and Co. or his other agents in Russia, and of the produce of the sales.

The defendant put in an answer, which, admitting that the letters of the 14th and 15th of March contained the agreement for a partnership, contended, first, that it did not exclude him from trading with Anderson & Co. upon his private account; secondly, if that should be considered the effect of the agreement, that he had afterwards proposed that he should be at liberty to do so, to which proposal the plaintiff had consented; thirdly, that there was nothing in the terms of the agreement prohibiting him from carrying on trade upon his private account with any other person in Russia. The defendant insisted, as the effect of the correspondence, which continued down to 1798, that the plaintiff submitted to a dissolution of the partnership, and it was considered as at an end. He admitted that he made large consignments to a person

whom he had sent out to Russia, and made considerable profit thereby, not derived from the goods sent upon the joint account; and the goods so sent out by him to that agent were, after the partnership was so considered at an end, sold upon the private and separate account of the defendant; insisting that there was no stipulation in the terms agreed upon for forming the partnership which prevented that, and upon the letters of August and September, 1795, that he had a right to consign any goods or merchandise, except muslins, upon his own account to Anderson & Co.; that he never did during the partnership send them muslins on his private account, or any goods before that consent was given; and that he might during the partnership send muslins or any other goods to any other persons without the plaintiff's consent. He admitted that the goods sent to Russia upon his private account were, notwithstanding a loss upon some articles, upon the whole disposed of at a considerable profit; and that he received several remittances in bills and money from Anderson & Co. on that account.

Exceptions to this answer being allowed, a further answer was put in, admitting that the defendant had in his possession several books and papers relating to the goods sent by him to Anderson & Co., and other persons in Russia on his separate account; but submitting that he ought not to be compelled to produce them. Exceptions being again allowed, the defendant, by a third answer, again submitting that for the reasons before stated he ought not to be compelled to give a particular account relating to the separate trade, &c., set forth by a schedule a list of books containing all the letters relating to it.

A motion that the defendant may be ordered within a fortnight to produce for the inspection of the plaintiff the several books, &c., mentioned and referred to in the schedule to the second further answer, supported by Sir *Samuel Romilly* and Mr. *Cooke*, and opposed by Sir *Arthur Piggott*, stood for judgment.

The Lord Chancellor. It is insisted for the defendant, that as to some of the books and papers, the inspection of which is the object of this motion, though a demurrer or a plea has not been put in, the defendant is not bound to make any discovery as to that which he calls his separate and private trade; and one view of this case, as represented by the bill, is, that if this is really to be considered as the separate trade of the defendant, he by art, contrivance, and misrepresentation, induced the plaintiff to withdraw from that which is represented as the joint trade; and the production of the papers required would manifest that, when the defendant represented the Russia trade to be a losing concern, he was carrying it on himself with great advantage; and in this view the production is important. The bill, however, has by no means charge enough to justify the production upon that

ground; and the only ground upon which it can be obtained is, that upon the whole case, taken altogether, the defendant cannot refuse the further discovery, considering what he has in fact answered.

The allegation is no more than a charge of what is contended to be the effect of the letters themselves, that upon the conclusion of the treaty for the joint concern, it was expressly understood and agreed that neither of them should send any goods upon their separate accounts to Russia, consigned to Anderson & Co., or to any other person; that the whole was to be joint; that this was a part of the terms of the partnership, the basis of it, as appears by the letter of March, 1798. As to one of the points made by the defendant, if this agreement, according to its true import, as it appears upon the bill, does not prohibit the defendant from trading separately with Anderson & Co., or with any other person, the proper course for the defendant seems to be a demurrer, as to any account of the private trade; the plaintiff having no title to discovery or relief upon that head, if not prohibited by the agreement. The defendant, not taking that course, has made this defence by these three answers.

It is necessary to advert to the particulars of this correspondence to see whether it bears out the assertion, that the defendant had the plaintiff's leave to trade generally with Anderson & Co. to any extent upon his separate account; not merely in a particular adventure. A proposition of the plaintiff to wind up and put an end to the concern certainly appears; but the defendant must show that it was wound up and determined. He states a letter on the 31st of August, 1795, opening a proposal to the plaintiff, to which he expresses a strong inclination to accede, for liberty to the defendant to trade separately with Anderson & Co., except in the article of muslins; but that does not appear to have been matured into agreement. The letter of the 17th of August, 1796, upon which the defendant contends that the plaintiff submitted to a dissolution of the partnership on such terms as the defendant should think proper, not having produced any answer, or communication of terms, cannot have the effect of dissolving the partnership. The defendant's conclusion, from his letter of the 16th of January, 1797, and that of the plaintiff of the 24th of January, is, that the partnership was considered as at an end; but a positive averment that it was at an end is necessary, the correspondence leaving that fact, and by whom it was determined, extremely doubtful; and the conclusions of the parties may have been different.

The letter of September, 1795, upon which the defendant relies, expresses no more than that in the mean time he may, if agreeable, make up a parcel of any articles, except muslins; certainly not importing a general permission to trade in any articles, either with Anderson & Co.

or with any other person. So in the letter of the 24th of August preceding, the plaintiff says he approves of his sending out a few boxes, not doubting they will be all Lancashire goods. It is extremely difficult to maintain upon the whole correspondence that a general permission is given to trade with Anderson & Co. generally, for all articles, and to all time. These letters are also material as written evidence that the defendant did not conceive himself to be at liberty to carry on a private, separate trade with Anderson & Co. The letter of the 13th of August clearly shows that the partnership was not then dissolved; but the fair construction is, that it applies to a concern not in progress, but not finally wound up.

The answer contends that, upon the true meaning of the agreement contained in these letters, there is nothing that prohibits the defendant from sending articles of any description to any person, except Anderson & Co.; and insisting also upon the special permission to send any goods, except muslins, to Anderson & Co., submits that the plaintiff is not entitled to the accounts prayed; and that the defendant is not to be compelled to set forth such accounts, or to produce any books, &c.; denying that any thing is due from him in respect of the profits, in case any profits were made by the goods so sent by him; having before admitted that profits were made.

The effect of the answer is this: the defendant discovers that he did carry on a separate trade; that he derived considerable profit from it, and has books relating to it; but insists that he is not liable to be called on to state what books he has. This is not a demurrer as far as the bill seeks an account of these facts, but an answer, making a partial discovery, and refusing the rest; and it recalls to my mind the inconvenience which struck me forcibly in some former cases. The old rule, before the time of Lord Thurlow, was either to demur, to plead upon something *dehors* the bill, or that sort of negative plea of which we know more in equity than at law, or to answer throughout. The inconvenience of this new mode of pleading is, that the defence is not judged of by the court in the first instance; but it goes first to the Master upon exceptions to the answer; then to the court upon exceptions to the report; assuming in this instance a different shape, a motion for the production of books and papers, in substance the same, as that production can only be required upon the same principle; the whole process being gone through under which formerly the defendant was understood as admitting that he had no such short answer to state as would entitle him to a declaration in the first instance, whether he ought not to make any further answer, which might leave an equity to be decided upon at the hearing.

The course this has taken is, that exceptions to the answer were

allowed, and a further answer was put in, with an admission that there are in his possession several books and papers relating to the goods so sent to Anderson & Co., and to other persons in Russia, upon his separate and private account; submitting, however, that he ought not to be compelled to produce them; insisting therefore by the second answer, not in the form of a plea or demurrer, that the plaintiff is not entitled to the discovery, which, however, is partially given. Exceptions were again taken, and the Master's opinion being that the second answer was also insufficient, a third answer was put in, by which the defendant, submitting that for the reasons and under the circumstances before stated he ought not to be compelled to give a particular account relating to the trade carried on by him separately, has, however, set forth in a schedule a list of books in which are contained all the letters, &c., relating to that separate trade.

The short result is therefore this: the plaintiff, stating a partnership formed upon certain terms contained in a written correspondence, contends that the meaning of the parties was, that no trade should be carried on with Russia except on the joint account; alleging that the defendant did, in fraud of that agreement, and concealing the fact, carry on a separate trade, not only with Anderson & Co., but originally, contrary to the agreement, with other persons; insisting that this conduct of the defendant was in both its branches a direct violation of the agreement, giving the plaintiff a right to a moiety of the profits. The course taken by the defendant is not to demur or plead, but to state by answer that, according to the true construction of the letters containing the terms of the agreement, he had full liberty to carry on this separate trade; that afterwards, not choosing to rest upon that any longer, he carried it on with the leave of the plaintiff; and that is not a mere general assertion, but it is made with reference to the letters. The defendant says that he will, though the plaintiff is not entitled to the discovery, state that the defendant, having that license, did trade at a considerable profit; that he kept books and accounts, referring to and setting forth by a schedule the books which he has, yet by the same answer refusing to permit the plaintiff to look at them.

As to the conclusion of fact, it is by no means clear that the defendant had any right to trade with other persons; but upon the letters, considered as an agreement, the far better opinion is, that he had no right to trade separately with Anderson & Co. If the answer had contained a clear, positive, unequivocal averment of the plaintiff's acquiescence and permission, the question whether the defendant was bound to make the discovery as to the fruit of it would fairly arise; but the utmost amount of what appears is a special consent to send a

small quantity, which can never be represented as a general acquiescence in an unlimited trade, contrary to the general obligation.

The result is, that here is not averment positive enough of the ground upon which the defendant can refuse to answer; that the manner in which he states his objection makes it impossible for the court to decide that he shall give no further or other answer, according to the language of pleading; and upon the whole, as he has put his defence upon the record, he cannot refuse a production of the books contained in the schedule.

OVEY v. LEIGHTON.

BEFORE SIR JOHN LEACH, V. C. MARCH 9, 1825.

[*Reported in* 2 *Simons & Stuart*, 284.]

THE original bill was filed for a discovery and partition. The defendant by his answer admitted that he had in his possession title-deeds belonging to the estate in question, but stated that he was a purchaser for valuable consideration, and insisted that for that reason he was not bound to set forth a schedule of those deeds as required by the bill.

The plaintiff did not take exceptions to the answer, but amended his bill, and charged many particulars as to the title to the estate and the deeds in the defendant's possession.

The defendant, by his answer to the amended bill, again insisted that he was a purchaser for valuable consideration, and, as such, not bound to set forth a schedule of the deeds.

The plaintiff excepted to this answer, on the ground that it neither contained a full answer as to the title nor a schedule of the title-deeds as required by the bill. The Master overruled the exceptions; upon which the plaintiff excepted to his report.

Mr. *Wakefield*, in support of the exceptions, contended that, although a purchaser for valuable consideration might by plea protect himself from answering fully, yet, that if he submitted to answer, he must answer as to every particular interrogated to by the bill.

Mr. *Hart* and Mr. *Perkins*, contra, insisted, first, that the defendant, being a purchaser for valuable consideration, was within the exception to the general rule, and might by answer protect himself from answering fully, and cited Jerrard *v.* Saunders;[1] and, secondly, that the plaintiff, not having excepted to the answer to the original bill, could not maintain exceptions to the answer to the amended bill as to points which were applicable to the answer to the original bill.

The VICE-CHANCELLOR held, first, that a purchaser for valuable consideration, submitting to answer, and not protecting himself by plea, must answer fully; and, secondly, that the plaintiff, having waived this exception to the answer to the original bill, could not recur to it on the answer to the amended bill.

[1] 2 Ves. jr. 454.

THE EARL OF PORTARLINGTON *v.* SOULBY.

BEFORE SIR LANCELOT SHADWELL, V. C. JUNE 10, 1834.

[*Reported in* 7 *Simons*, 28.]

THE plea put in in this case having been ordered to stand for an answer, with liberty to except,[1] the plaintiff excepted accordingly. The Master allowed the exceptions, upon which the defendant excepted to his report.

Mr. *Rolfe* and Mr. *Sidebottom*, in support of the exceptions, contended that a purchaser for valuable consideration did not fall within the general rule, but might, by answer, protect himself from answering fully; and that the case of Ovey *v.* Leighton[2] was contrary to prior decisions; and they relied on Jerrard *v.* Saunders,[3] Rowe *v.* Teed,[4] and Leonard *v.* Leonard.[5]

The *Solicitor-General*[6] and Mr. *Bagshawe*, for the report.

The VICE-CHANCELLOR said that the rule laid down in Ovey *v.* Leighton, that a purchaser for valuable consideration who submits to answer, must answer fully, was correct, and overruled the exceptions.

[1] See *ante*, p. 148. [2] 2 Sim. & Stu. 284. [3] 2 Ves. jr. 454.
[4] 15 Ves. 372. [5] 1 Ball & Beatt. 328. [6] Sir C. C. Pepys. — ED.

ADAMS v. FISHER.

BEFORE LORD LANGDALE, M. R. MARCH 12, 1838.

[*Reported in* 2 *Keen*, 754.]

BEFORE LORD COTTENHAM, C. JUNE 15, 1838.

[*Reported in* 3 *Mylne & Craig*, 526.]

THE original bill, which was filed against Mr. Fisher, a solicitor, alone, alleged that the plaintiff, being entitled to the residuary estate of John Collinridge, had employed the defendant as his attorney and solicitor to get in and manage the estate of the testator. It stated that the defendant had received divers moneys in the course of such employment, and that he had in his possession title-deeds and papers relating to the testator's affairs; and it prayed for an account of the moneys received, and for the delivery up of the documents.

The defendant Fisher, by his answer, admitted the receipt of the assets of the testator, but he denied that he had been employed as the solicitor or attorney of the plaintiff; he stated that the plaintiff and other parties interested in the estate had executed a power of attorney, appointing a Mr. Pinckard their attorney to get in the estate of the testator, and to appoint an attorney or substitute under him for that purpose; that Mr. Pinckard had retained the defendant as solicitor in the matters of the estate; and that the defendant, having received the assets of the testator, to the amount of £672, had paid over the balance, after deducting £560, the amount of his bill of costs, to Pinckard, and had obtained a receipt from Pinckard for the same, thereby expressly admitting the amount of the balance. He admitted that the bills of costs had never been taxed, and that he had in his possession divers documents relating to the testator's estate and affairs, and relating to the matters in the bill mentioned, a list of which was set forth in the schedule; he, however, denied the plaintiff's right to call for their production.

On the 4th of December, 1835, the plaintiff moved for the production of these documents, but the motion was refused with costs. The plaintiff then amended his bill, and he made the representative of

Pinckard (who was dead) a defendant thereto; and he thereby still insisted that Fisher had been employed as the plaintiff's attorney, and charged fraud and collusion between Pinckard and Fisher; this, however, was denied by the answer. The amended bill stated, as a fact, the execution of a warrant of attorney to Pinckard. The further answer of Fisher denied the alleged fraud, and again insisted that he was the attorney of Pinckard, and not of the plaintiff, and consequently not bound to produce the documents admitted to be in his possession. The representative of Pinckard admitted the possession of some other papers.

Mr. *O. Anderdon* moved, as against both defendants, for the production, for the usual purposes, of the documents in their possession.

Mr. *Pemberton* and Mr. *Bagshawe*, contra.

The MASTER OF THE ROLLS ordered the production of the documents in the possession of the representative of Pinckard; but, on the ground of want of privity between the plaintiff and Fisher, he refused the motion, as regarded Fisher, with costs.

June 15.

A motion was now made before the Lord Chancellor, that the order of the Master of the Rolls might, as to so much thereof as related to Fisher, be discharged or varied, and that an order might be made in the terms of the original notice of motion, so far as such notice applied to the defendant Fisher.

Mr. *O. Anderdon*, in support of the motion. If a solicitor has in his hands documents essential to the plaintiff's case, the plaintiff may make him a party to the record, and call upon him to produce the documents. Fenwick *v.* Reed.[1] The defendant has incorporated the schedule in his answer. The objection made before the Master of the Rolls was, that there was no sufficient privity between the plaintiff and Fisher; but the simple question upon matters of this kind is, do the documents, of which the possession is admitted, relate to the matters in question in the cause; and if there is an admission that they do so relate, it will be sufficient.

The LORD CHANCELLOR. You must show such a connection between the plaintiff and defendant as entitles the plaintiff to see the documents; you cannot file a bill against a mere stranger for the production of documents.

Mr. *O. Anderdon*. Here, however, the parties stand in a fiduciary relation. A bill is the proper mode to adopt for the purpose of having the solicitor's bills of costs taxed, in a case of this kind, where the

[1] 1 Mer. 114; see pp. 122, 123.

solicitor chose to look to Mr. Pinckard, though he dealt with the plaintiff's name. The defendant might be compelled to set out the documents at full length in the answer, and the production of the documents is part of the discovery which the defendant by answering submits to make; the plaintiff is not bound to wait till he shall have established his title to an account from the defendant at the hearing of the cause. Unsworth *v.* Woodcock.[1]

The LORD CHANCELLOR. If that were to be carried to the length to which you seem to carry it, it would make every application for the production of documents a matter of course.

Mr. *O. Anderdon.* Yes, unless the defendant has brought himself within some one of the grounds of protection, such as that the documents are of a privileged character.

The LORD CHANCELLOR. What the bill requires is not the contents of the documents, but a list of the documents; and you cannot except to the answer, because the contents are not set out.

Mr. *O. Anderdon.* The defendant might be compelled to set them out.

The LORD CHANCELLOR. You may ask him to do that, and then he may make his defence.

Mr. *O. Anderdon.* In Hardman *v.* Ellames,[2] which has carried the doctrine on this subject to its true length, the court held that a party merely referring to a document, which was part of his own defence, entitled the plaintiff to call for its production. The right way of raising the defence which the defendant has set up, viz., a denial of the plaintiff's right to the account, would have been a plea. The defendant might have been required to set out his bills of costs at length. The defendant does not allege that the documents are privileged, or that he has a duty to perform to some one else with respect to them.

In Evans *v.* Richard,[3] the application for the production of documents was resisted on the ground that the bill disclosed an illegal contract which could not be enforced; but the Lord Chancellor there says, "the event of the motion must depend on the fact, whether the answer contained an admission that the documents in question are in the custody of the defendant. When the court orders letters and papers to be produced, it proceeds on the principle that those documents are by reference incorporated in the answer, and become a part of it; being in the office, the effect is the same as if they were stated in *hæc verba* in the answer;" not putting it at all upon the point that if you make on the face of the bill a requisition that the documents shall be set out in *hæc verba*, that would expose the plaintiff to the

[1] 8 Madd. 432. [2] 2 Mylne & Keen, 782. [3] 1 Swanst. 7.

peril of costs. If a bill be filed, in which a liability to account is asserted, there is reason to suppose that there may be a decree for an account; and if the defendant does not demur or plead, the plaintiff has a right to go on to a hearing; and, for the purpose of assisting him to prove his case at the hearing, he has a right to see the documents in the defendant's hands which relate to the matters mentioned in the bill. In this case, the amended bill charges collusion between Fisher and Pinckard, and charges that Fisher's bills ought to be taxed, and prays an account generally. Fenwick *v.* Reed[1] shows that you may bring a solicitor before the court merely to ask costs against him. It is unnecessary, however, to enter into the question of the propriety of making Fisher a party in this case; for the rule is, that if a defendant does not think fit to demur or plead, and consequently answers, he cannot retire from any particular part of his answer which he thinks fit. Your Lordship is not bound now to determine whether, on a record framed as this is, the plaintiff is entitled to the relief he asks.

The Lord Chancellor. Suppose a bill is filed by a person claiming to be a creditor or legatee, or in any other assumed character, and the defendant denies that the plaintiff is what he is alleged to be, but states, on the contrary, that he is a perfect stranger, and denies, in short, every thing on which the plaintiff proceeds, but, not having protected himself by plea, he is obliged to answer; is the plaintiff, as a matter of course, to ask for all the documents in the possession of the defendant which relate to any of the matters introduced in the bill? I only want to know how far you carry the principle; whether, as a mere matter of course, documents, which, if the defendant's allegation is true, have nothing to do with proving the case made by the bill, are to be produced for the plaintiff's inspection? If a bill is filed by a person as a creditor, and he asks for all the title-deeds of the real estate, is the plaintiff entitled to see the title-deeds of a person's estate because he calls himself a creditor, which the defendant denies that he is?

Mr. *O. Anderdon.* In the case last put by your Lordship, the deeds would not relate to the mode in which the plaintiff is to make out that he is a creditor. But if a bill is filed by a person as a creditor, the defendant must set out an account of the estate, though he denies the debt. So in the case of a bill for tithes, the defendant cannot refuse to set out an account, though he denies the liability to pay tithes to the plaintiff. In the case of title-deeds put by your Lordship, the inspection of the deeds before the hearing could do the plaintiff no service at the hearing of the cause; but if the plaintiff in this cause cannot have now the documents which he asks for, he cannot have them at the hearing. If a creditor's bill be filed, the mere traversing the plaintiff's title does

[1] 1 Mer. 114.

not induce the court, upon an interlocutory application, to refuse production of the documents in the defendant's possession. The fact of the bill having been filed shows, for the purposes of the suit, that the plaintiff is a creditor. The production of the deeds of the real estate would only go to show what the estate was which was to be administered. But suppose the bill charged a pretence, that the deeds were not the deeds of the testator, but of another person, the plaintiff would probably be held entitled to see them. The authorities lay it down that the plaintiff is entitled to have the production of every thing he could carry into the Master's office, and certainly every thing he might take into court at the hearing. The purposes of justice require such a production.

The Lord Chancellor. As I understand the facts of the case, Fisher, the solicitor, was employed by Pinckard, he knowing, as he must have known, that in the transaction which was the subject of the suit, Pinckard was acting under a power of attorney from Adams; but still the retainer was entirely between Pinckard and Fisher. Pinckard settles the account with him. Then Adams says, I certainly have a right to an account against my trustee, and if he has improperly paid sums on account of the costs, they must, as a matter of course, be disallowed. The bill is then filed, and a claim made against the trustee, alleging that he has retained, on account of costs, more than he ought. Mr. Fisher, by his answer, denying all connection with the plaintiff, and all privity between them, the question is, whether, in such a state of the pleadings, Adams is entitled to enforce the production of the documents mentioned in Fisher's answer.

Now I took leave to ask Mr. Anderdon how far he carried the principle, and he very properly limits it within its due bounds; that is, he admits, as to every document not necessary to make out the plaintiff's equity, that the plaintiff is not entitled to see it. Whatever may make out the plaintiff's title he may have a right to see. The documents in question, however, are not to make out Adams's title to have the bills taxed; and the production of them could not possibly aid the assertion of the equity which Adams has asserted by his bill.

Then as to the cases referred to. In Unsworth *v.* Woodcock,[1] the facts of the case, unfortunately, are not stated, but it is quite obvious that the pleadings did show a title in the plaintiff to the production of the documents. The Vice-Chancellor assumes, as the whole ground of his judgment, that the case was one in which the plaintiff ought to see the documents; that is, that he had such an interest in them as entitled him to see them. What the facts were does not appear; but the court assumes that the plaintiff might have compelled the defendant to set out the contents of the documents in his answer.

[1] 8 Madd. 432.

Evans *v.* Richard[1] was a case in which the sole question was the illegality of the contract. There was no question about the title: the two parties to the cause were partners in the adventure, and of course, therefore, the plaintiff had as much interest in the documents as the defendant. There was no question as to the interest which the plaintiff had in the documents to be produced. The only doubt was, whether the question about the illegality of the adventure was to deprive the plaintiff of the right which, as to the interest, was not disputed.

Then it was said that, in the present case, the plaintiff had a right to make Fisher a party to the suit; and, in support of that proposition, the case of Fenwick *v.* Reed[2] was cited. The marginal note (which appears to be correct) of that case is as follows: "Attorney submitting to produce title-deeds of his client in his possession, as the court shall direct, may be called upon to produce them, if the principal could himself have been called upon to do so. Generally it is not necessary to make an attorney a party because he has title-deeds in his possession, although it may become so under particular circumstances." No question was made, therefore, as to the attorney's willingness to produce the documents; but Lord Eldon's observations as to the propriety of making a solicitor a party are guarded, as may naturally be supposed from the habits of that learned judge. He says:[3] "Generally speaking, and *prima facie*, it is certainly not necessary to make an attorney a party to a bill seeking a discovery and production of title-deeds merely because he has them in his custody, because the possession of the attorney is the possession of the client; but cases may arise to render such a proceeding advisable, as, if he withholds the deeds in his possession, and will not deliver them to his client on his applying for them." That is, if Fisher had refused to produce the documents to Mr. Pinckard, then, Lord Eldon says, there is reason for another person's applying. In Fenwick *v.* Reed the solicitor did not object to being made a party, and did not dispute the plaintiff's interest in the documents. All that Lord Eldon says amounts only to this: "I look to see whether the co-defendant is liable to produce the documents, and I must consider them, when in the possession of the attorney, as being in the possession of the party employing the attorney, inasmuch as the attorney does not set up the want of privity between him and the plaintiff as a defence."

As to Hardman *v.* Ellames, it is not very pertinent to the present case. It was certainly no new decision, and I was very much surprised to hear any one treat it as such; and when I came to look into the doctrines laid down in the books, I felt no doubt upon the subject.

[1] 1 Swanst. 7. [2] 1 Mer. 114. [3] See p. 123.

Where a party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it, however unfounded, which he pleases; but the plaintiff is entitled to see whether the defendant has rightly stated it. It is because the defendant chooses to make it part of his answer that the plaintiff is entitled to see it; not because the plaintiff has an interest in it. The principle is, that a defendant shall not avail himself of that mode of concealing his defence. But, whether that decision be right or wrong, it is quite distinct from the present case. I apprehend it is a mistake to say that the documents scheduled are part of the answer; the schedule itself is part of the answer. All that the plaintiff asks is, that the defendant may set forth a schedule of the documents. Can you except, because he has set out the documents in the schedule instead of in the answer? You did not ask that they should be set out in the answer. If that had been asked, the defendant must have defended himself in the regular way, and shown that he was not obliged to comply with your demand. But if the defendant sets them out in the schedule to his answer, the question is, upon the whole record, whether the plaintiff has such an interest in them as entitles him to call for their production? Here the defendant has denied the plaintiff's interest; he has, on the record, stated that which, as it stands, in my opinion, excludes the plaintiff from instituting this suit against him. As long as that stands, I think the plaintiff is not entitled to see the documents.

LANCASTER v. EVORS.

BEFORE LORD LYNDHURST, C. JANUARY 13, 1844.

[*Reported in* 1 *Phillips*, 349.]

THE LORD CHANCELLOR. Sir John Powell Price mortgaged to the Marquis of Buckingham certain estates, which he possessed in the county of Montgomery, for the sum of £24,000. A suit with respect to that mortgage was instituted by the Marquis of Buckingham against Sir John Powell Price; in the progress of that suit the estate was sold, and the sum for which it sold exceeded the amount of the debt; that excess, which amounted to £2800, or thereabouts, was paid into court in the cause of the Marquis of Buckingham *v.* Price. By the lapse of time, and by successive accumulations, that sum of £2800 now amounts to upwards of £20,000, three per cent. consols, and it is now in court. Evors, the defendant, is the heir-at-law of Sir J. P. Price. Sir J. P. Price was much embarrassed in his circumstances, and there were many outstanding judgments against him. Evors has purchased up these judgments, and he contends that he is entitled to the benefit of them, with respect to this sum that is now in court. That is the position of the defendant Evors.

The plaintiff sues as personal representative of a judgment creditor of Lady Price, the wife of Sir J. P. Price, and her personal representatives are made parties defendants. The bill states that Lady Price, during her lifetime, joined with her husband in conveying a real estate, of which they were seised in her right, as collateral security for the payment of a debt due from Sir J. P. Price to one Jaques; and that that debt, which originally amounted to £1500, but was ultimately increased by the accumulation of interest to the sum of £5000, instead of being paid, as it is contended that it ought to have been, out of the estate of Sir J. P. Price, which was included in the same security, was, after the death of Lady Price, paid out of her estate. Under these circumstances, it is contended that the estate of Lady Price is entitled to be reimbursed the amount so paid to Jaques, out of the estate of Sir J. P. Price; that is, out of this sum of £20,000, which represents that estate; and that the plaintiff is entitled to have that amount,

when recovered from the estate of Sir J. P. Price, made available for the satisfaction of his demand, there being no other assets of Lady Price to which he can resort for that purpose.

Such being the equity which the plaintiff asserts by his bill, he alleges that the outstanding judgments against the estate of Sir J. P. Price were purchased by Evors for small considerations; and he interrogates him as to whether or not he has purchased these judgments; and if he has purchased them, for what consideration. Evors, in his answer, admits that he has purchased these judgments, but he says he is a purchaser of them for a valuable consideration, without any notice of the lien claimed by Lady Price, or the persons who represent her; and he submits that he is not bound, therefore, to answer as to that part of the interrogatory which relates to the sums that he has paid for these incumbrances. Upon this the plaintiff excepted to the answer, and the exception was allowed by the Master; it afterwards went before the Master of the Rolls, who confirmed the decision of the Master, and it has now come by appeal to this court. The question is, whether that exception was properly allowed by the Master.

Now there is no principle more clearly established, as I understand it, in the court than this, — that when a party answers, he is bound to answer fully. If he has a defence against the equity set up by the plaintiff, and he wishes to avail himself of that defence without making any discovery as to facts that are alleged in the bill, he must avail himself of that defence according to the nature of the case, either by demurrer or by plea. I consider that as a settled rule. Formerly it was considered a doubtful question, and different opinions prevailed; but after the strong opinions expressed by Lord Eldon on this point, particularly in the case of Rowe *v.* Teed [1] and the case of Somerville *v.* Mackay,[2] the question seems to have been considered by the profession as settled; and, accordingly, afterwards, when it came before Sir John Leach, in the case of Mazzaredo *v.* Maitland,[3] he stated that he was present when Lord Eldon expressed his opinion in Somerville *v.* Mackay; that he

[1] 15 Ves. 372. [2] 16 Ves. 382.

[3] 8 Madd. 66. [February 9, 1818. This case did not directly involve the point upon which it is here cited; but in delivering his judgment, Sir John Leach said (p. 70): "A defendant cannot by answer object to answering, though by plea he may. That point was much considered in Somerville *v.* Mackay; it is not expressly decided there; but I remember, during the argument, the Lord Chancellor strongly expressed his opinion that a defendant could not answer as to part of a bill, and refuse to answer the rest; and I think that is so useful a rule that I shall always adhere to it." Again, at p. 72, he says: "A defendant cannot by answer deny the plaintiff's title, and refuse to answer as to facts which may be useful evidence in support of that title. He cannot answer in part; if he answers at all, he must answer the whole of the bill." — Ed.]

considered Lord Eldon intended to lay down the rule, that, when a party under these circumstances answered, he must answer fully, and that that was the rule to which he should always adhere. Afterwards, in ——— *v.* Harrison,[1] which was a case of partnership where the defendant denied the partnership, and therefore refused to set out the accounts, Sir John Leach stated that he considered the point as settled, that if the party answered, he was bound to answer fully; that if he did not choose to set out the accounts he ought to have pleaded; and he allowed the exception.

I consider, therefore, the rule as settled, and for this, among other reasons, that if the defence which a party sets up by the answer should be decided against him, it is of the utmost importance that all consequential matters, which are material for the purpose of the decree, should receive an answer.

It was for some time considered an exception to the rule when the defence was a purchase for valuable consideration without notice; but in the case of Ovey *v.* Leighton,[2] where that point came distinctly before Sir John Leach, he said that it fell within the same principle, and he decided accordingly; and afterwards the present Vice-Chancellor of England, in the case of the Earl of Portarlington *v.* Soulby,[3] acted upon that decision. I consider, therefore, that this is no longer to be considered an excepted case, and that a party, whose defence is that he is a purchaser for valuable consideration without notice, cannot, if he chooses to make that defence by his answer, refuse to answer consequential matters; and that if he wishes to protect himself from that necessity, he ought to avail himself of the defence by plea or by demurrer.

I consider this point so clearly settled that I have come to the conclusion that this appeal would never have been brought had it not been for the decision of Lord Cottenham in Adams *v.* Fisher, which was so much relied on at the bar, and which has been subjected to so much criticism; but after a careful review of that case, I do not think that it was the intention of that learned person to break in upon the rule which I have stated. The case did not come before the court upon an exception to the answer, but upon a motion for the production of documents; and that it was upon the ground of that distinction that the decision rested is, I think, evident from several passages in the report.

[1] 4 Madd. 252. [April 20, 1819. The report is as follows: A bill was filed, stating a partnership, and praying an account. The defendants, by their answer, denied the partnership, and refused to set forth any account. Exceptions were taken to the answer for insufficiency, in not having set forth the accounts.

The Vice-Chancellor. That point is settled. If a defendant answers, he must answer fully. They should have pleaded. *Exceptions overruled.* — Ed.]

[2] 2 S. & S. 284.

[3] 7 Sim. 281.

The argument, it appears, was, that, by setting out a list of the documents in the schedule, the defendant had incorporated them in his answer; and that unless he brought himself within some one of the grounds of protection, such as that the documents were of a privileged character, he must produce them. In answer to that, however, the Lord Chancellor says: "What the bill requires is not the contents of the documents, but a list of them. You cannot except to the answer, because the contents are not set out. You may ask the defendant by your bill to set out the contents, and then he may make his defence." Then, afterwards, when he comes to deliver his judgment, he says: "All that the plaintiff asks is, that the defendant may set forth a schedule of the documents. Can you except because he has set out the documents in the schedule instead of in the answer? You did not ask that the contents should be set out. If that had been asked, the defendant must have defended himself in the regular way, and shown that he was not obliged to comply with your demand" (there, as it appears to me, he adopts the general rule); "but," he continues, "if the defendant sets them out (*i. e.* the list merely) in the schedule to his answer, the question is upon the whole record whether the plaintiff has such an interest in them as entitles him to call for their production. Here the defendant has denied the plaintiff's interest; he has upon the record stated that which, as it stands, in my opinion, excludes the plaintiff from instituting this suit against him."

I think it is plain from these passages that Lord Cottenham considered that the application then made to him stood upon different grounds from an exception to an answer. What I understand him to say is this: "If you had asked by your bill for the contents of the documents, and the defendant had refused to set them out, and you had come here upon exceptions to the answer, the case might have been different; but you have not excepted to the answer, nor could you, for the answer goes to the full extent of what is required by the bill; but you come by way of motion that the documents may be produced. Now that is not a motion of course, but one on which the court will exercise its discretion, and if, upon the whole record, the court is satisfied that it would not be proper that the documents should be produced, it will refuse the motion."

Such was the distinction drawn in that case, and it was upon that distinction that the judgment rested. The distinction, I am aware, has been the subject of criticism by persons of deep learning and great research; but it is unnecessary for me to pursue that criticism, or to say whether or not it was well founded. It is sufficient for me to say, that as Lord Cottenham expressly drew the distinction, I am at liberty to infer that he never intended, by his decision, to break in upon the rule

which had been laid down, and so long and so uniformly acted upon, — that when a party answers, he is bound to answer fully.

On that ground alone, therefore, if there were no other, I should be of opinion that the exception was properly allowed.

But there is also another ground to which I shall very shortly advert, and which is this: The defendant is the heir-at-law of Sir J. P. Price, and an heir-at-law buying in incumbrances purchases them for the benefit of the estate;[1] it is therefore wholly immaterial whether at the time when he made the purchase he knew that there was an outstanding claim against the estate or not; for, having purchased for the benefit of the estate, he is not entitled to more than the sums which he actually paid. The defence of his being a purchaser for valuable consideration without notice is therefore inapplicable to this case; and the answer to the question, how much he paid for the incumbrances, is of the very essence of the suit.

But I do not rest my decision on this ground, for I think it is so important to the profession that the rule to which I have adverted should not be supposed to have been trenched upon by the decision in Adams v. Fisher, that I choose to decide the case upon the former ground. The appeal must be dismissed, and with costs.

[1] See Brathwaite v. Brathwaite, 1 Vern. 884; Williams v. Springfield, ib. 476; Morret v. Paske, 2 Atk. 52.

SWINBORNE v. NELSON.

BEFORE SIR JOHN ROMILLY, M. R. DECEMBER 10 AND 11, 1852, AND JANUARY 28, 1853.

[*Reported in* 16 *Beavan*, 416.]

IN 1837, Nelson obtained a patent for the manufacture of "isinglass," and in 1839 he obtained a patent for making "gelatine."

In 1847, Swinborne obtained a patent for making "gelatinous substances," the specification of which he enrolled on the 24th of May, 1848. The plaintiff, by this bill, alleged that the defendants had infringed his patent by manufacturing articles sold by them as "gelatine" and "isinglass," by a process substantially similar to the process described in the specification of the 24th of May, 1848, or only colorably differing therefrom; and alleged that the defendants had resorted to various subtle arts and contrivances to conceal the infringement.

The bill charged that the defendants, after the 24th of May, 1848, altered their mode of manufacture; that several articles now manufactured and sold by the defendants by the names of "Nelson's Patent Refined Isinglass," &c., and which were then manufactured and sold by them in large quantities, were imitations of the same names respectively manufactured and sold by the plaintiff, and the one could not but with great difficulty be distinguished from the other; and that the articles so manufactured and sold by the defendants could not have been manufactured by either of the processes described by Nelson under his "isinglass" patent or his "gelatine" patent, by any process known to or practised by the defendants previously to the 24th of May, 1848, and that they had been manufactured by them, for the first time, since the 24th of May, 1848, and they had, in fact, been manufactured by them by an imitation of the process, or some material part of the process, of Swinborne, as described in the specification. The bill charged that it would so appear, if the defendants would set forth when they first manufactured, and to whom by name they first sold, any and what quantity of the articles then manufactured and sold by

them, under the names of "Nelson's Patent Refined Isinglass," &c., respectively, and from what substance the same respectively were manufactured, and what were the respective processes of such manufacture.

The bill also charged that the defendants "ought to set forth an account of all articles manufactured and sold by them since the 24th of May, 1848," under the names of "Nelson's Gelatine Isinglass," &c., and the quantities thereof respectively, and the names and addresses of the persons to whom sold and at what prices, and the profits which the defendants had realized thereby.

The bill prayed an account of all the articles manufactured by the defendants since the 24th of May, 1848, under the names of "Nelson's Gelatine Isinglass," &c., and the profits made thereby, and for payment to the plaintiff of the amount, and for an injunction to restrain the defendants from manufacturing those articles, or any other articles which were an imitation of the articles manufactured and sold by the plaintiff under the names of "Patent Refined Isinglass," &c., and from infringing the patent-rights of the plaintiff.

The 13th interrogatory asked the defendants to set forth when they first manufactured, and to whom by name they first sold, any and what quantity of the said article now manufactured and sold by them under the said names of "Nelson's Patent Refined Isinglass," &c., respectively, and what were the respective processes of such manufacture.

A subsequent part of the same interrogatory required the defendants to set forth an account of all articles manufactured and sold by them since the 24th of May, 1848, under the names of "Nelson's Gelatine Isinglass," &c., and the quantities thereof respectively, and the names and addresses of the persons to whom sold and at what prices, and the profits which the defendants had realized thereby.

The principal defendant, by his answer, denied the novelty and utility of the plaintiff's alleged invention. He also denied altogether the infringement by him of the plaintiff's patent, and the circumstances alleged in respect to it. He denied that the articles were manufactured by him by any process which was an infringement or imitation of the plaintiff's processes described in his specification, and he said that the processes by which such articles had been manufactured since the 24th May, 1848, were the same as those used by him previously to that date, except that the slices of hide or skin had been cut rather thinner, previously to the same being macerated in a caustic solution of alkali.

In answer to the 13th interrogatory, the defendant "submitted that he was not bound, and ought not to be required, to set forth when he first manufactured, or to whom by name he first sold, any or what quantity of articles now manufactured and sold by him under the

names of 'Nelson's Patent Refined Isinglass,' &c., respectively, or from what substances the same respectively were manufactured."

He "denied that the plaintiff had recently discovered, or that it was the fact, that since the 24th of May, 1848, the defendants had infringed the letters-patent dated the 24th of November, 1847, in the manufacture of the articles manufactured and sold by them under the name of "Nelson's Patent Opaque Gelatine," or by cutting the residuum after the first solution had been taken, as described in the gelatine patent, into thin slices, or by subjecting the same to the solvent action of water, or by any such or the like or any other process in imitation of the process described in the specification dated the 24th of May, 1848, or in lieu of the subsequent process described in the gelatine patent."

He admitted that, since the 24th May, 1848, he had manufactured and sold, and "continued to manufacture and sell, large quantities of the articles called 'Nelson's Patent Opaque Gelatine;' but he denied that he so manufactured and sold the same by means of such infringement as in the bill mentioned."

He "submitted that he was not bound, and ought not to be required, to set forth an account of all articles manufactured and sold by him since the 24th May, 1848, under the names of 'Nelson's Gelatine Isinglass,' &c., or the quantities thereof respectively, or the names or addresses of the persons to whom sold, or at what prices, or the profits which he had realized thereby."

The plaintiff took exceptions to the defendant's answer, insisting that the 13th interrogatory had not been answered. The exceptions now came on for argument.

Mr. *Lloyd* and Mr. *Bagshawe*, in support of the exceptions. The answer to the 13th interrogatory is clearly insufficient. The defendant does not affect to answer that interrogatory, but he submits he is not bound to do so. The rule of the court is clearly established, that if a defendant chooses to answer a bill, he must answer it fully. Mazarredo *v.* Maitland;[1] Lancaster *v.* Evors.[2] A party cannot, by denial in his answer of the plaintiff's title, relieve himself from the obligation of giving a full discovery. He cannot, as in this case, draw his own conclusions as to the law and facts, and then withhold the discovery of the circumstances necessary to test the accuracy of his own conclusions in his own favor. Here the denial of title itself is insufficient. Edwards *v.* Jones.[3] The defendant does not bring himself within the principle of Adams *v.* Fisher.[4] There the question was as to production, upon the admissions of the defendant; here the point is as to the sufficiency of the answer.

[1] 3 Madd. 66. [2] 1 Phill. 349. [3] 1 Phill. 501.
[4] 2 Keen, 754, 3 Myl. & Cr. 526.

Mr. *R. Palmer* and Mr. *Baggallay*, contra. The question is, what discovery is the plaintiff entitled to in this stage of the cause? A plaintiff is not entitled to any discovery he may choose to ask; his right is limited, and the rule, as stated by Sir James Wigram, is this, — that a plaintiff is only entitled to such discovery as is necessary for the decision of the issue. The rule as to answering fully does not apply, where the discovery is not material to the relief sought by the bill. Wood *v.* Hitchings;[1] Simpson *v.* Chapman.[2] The complaint here is of the infringement of the plaintiff's patent, which is wholly denied by the defendant. Until that point has been decided, what use can it be to set forth voluminous accounts of all the articles, and the quantities and prices and profits of articles sworn to have been manufactured by the defendant's new process, and all the names and all the addresses of all the defendant's customers; nay, what right can the plaintiff have to such a discovery? He is entitled to an account of pirated articles, but of no others. Where the title is denied, a defendant is not bound to set forth the consequential accounts. Gethin *v.* Gale;[3] Sweet *v.* Young;[4] Jacobs *v.* Goodman;[5] Hall *v.* Noyes;[6] Marquis of Donegal *v.* Stewart;[7] Phelips *v.* Caney;[8] Neuman *v.* Godfrey.[9] The case of Adams *v.* Fisher[10] proceeded on the same principle; there the title of the plaintiff being denied, it was held that he was not entitled to a production of documents in the defendant's possession, which did not tend to make out such title. The only way for a defendant to protect himself is by answer: a plea is inappropriate, and could not be framed in a matter of such complication as the process of a manufacture.

Secondly. The discovery asked is of a most oppressive and vexatious nature. The court has shown an unwillingness to sanction inquisitorial discovery: Dos Santos *v.* Frietas;[11] where the court observed, "that if the court were to enforce this species of inquisition into a man's private affairs and business, the sooner its doors were closed the better, for it would be a scourge to the country." If the present course be sanctioned, a party, by a mere allegation of an infringement of his patent, might compel a rival trader to reveal all his secrets, and disclose the names of his customers, and the profits, accounts, and every other transaction relating to his trade, however immaterial it might be to the matters in issue. The court has frequently limited the plaintiff's right to discovery by a positive order. Thus, in the Earl of Stafford *v.* Blakeway,[12] a plea of the Statute of

[1] 3 Beav. 504. [2] 15 Jur. 714. [3] Cited 1 Ambl. 354.
[4] 1 Ambl. 353. [5] 3 Bro. C. C. 487, n. [6] 3 Bro. C. C. 483.
[7] 3 Ves. 446. [8] 4 Ves. 107. [9] 2 Bro. C. C. 332.
[10] 3 Myl. & Cr. 526. [11] Wigram on Discovery, 2d ed. 168.
[12] 6 Bro. P. C. 633.

Limitations was ordered to stand for an answer, with liberty to except, "but not to oblige the appellant to make any discovery of the value or particulars of the real or personal estate" of the testator. In King v. Holcombe,[1] "the plea was ordered to stand for an answer, with liberty to except, but not as to the account." The same was done in Bayley v. Adams,[2] and in Wedderburn v. Wedderburn,[3] where the plea was ordered to stand for an answer, with liberty to except, "but the plaintiffs were not to call for any account of the profits of the trade since the 1st of May, 1801."

Although the Master may not have such an authority, the court has the power of modifying the general rule and restricting the discovery within those limits which are essential for the purposes of justice. This may perhaps explain the difference in practice between this court and the Exchequer, where exceptions were argued, in the first instance, before the court, and not before the Master.

Somerville v. Mackay,[4] Rowe v. Teed,[5] Shaw v. Ching,[6] were also cited.

Mr. *Lloyd*, in reply.

The MASTER OF THE ROLLS reserved judgment.

January 28, 1853.

The MASTER OF THE ROLLS. The question that arises in this case is, whether the defendant has sufficiently answered the plaintiff's bill. The plaintiff is possessed of a patent for the manufacture of isinglass, and he charges the defendant, who is a manufacturer of isinglass, with having infringed his patent, and he asks for an account of the defendant's dealings and transactions, and seeks to make him answerable for the profits made by him in his manufacture of isinglass, according to the process discovered by the plaintiff.

The interrogatories in question relate to these dealings and transactions of the defendant, and the profits made by him in his business. The defendant admits that he has not answered these interrogatories, but he contends that he is not bound to answer them, and he rests his defence on this principle, — that he disputes the title of the plaintiff. He denies the existence of that title; he contends that it is not, and that it will not be ever established, and he urges that it would be an act of oppression upon him, and contrary to the rules and practice of this court, to compel a defendant to set out an account of the profits earned by him, when, in truth, it may and probably will turn out that the court will not at the hearing direct any account at all to be taken of those profits.

[1] 4 Bro. C. C. 440. [2] 6 Ves. 599. [3] 2 Keen, 732, note.
[4] 16 Ves. 382. [5] 15 Ves. 372. [6] 11 Ves. 303.

The defendant relies, in support of his position, on the case of Adams v. Fisher,[1] which has been the subject of much comment; and it was principally with the view of more maturely considering that case that I reserved my judgment on these exceptions. That case is generally understood to lay down, as a broad principle, that the right of the plaintiff to see the documents, which are admitted by the defendant to be in his possession, and to relate to the subject-matter of the suit, and which are not otherwise protected, must depend upon the plaintiff's having established his right to relief in that suit, or on the circumstance that that right is not disputed by the defendant. Lord Cottenham rests his decision, refusing to permit the plaintiff to inspect the documents in that case, on the circumstance that the defendant had denied the plaintiff's title, and had stated upon his answer that which, if true, would preclude the plaintiff from instituting the suit against him.

The first question to be considered is, whether the answering interrogatories rests on the same principle as the production of documents? and if that question be answered in the affirmative, the next question is, whether the decision in Adams v. Fisher precludes the plaintiff from obtaining the discovery here sought?

With respect to the first question, it admits, in my opinion, of an easy answer. It is, I think, impossible to lay down one rule, on this subject, for the production of documents, and another for the answer to be put in to the interrogatory. Such a distinction would be, in truth, opposed to all principle and all authority, and it would be a mere technicality, which would be easily evaded, and would give rise to expense and delay. It is obvious that if a defendant, who could avoid producing a document by disputing the plaintiff's title, could not, on the same ground, avoid answering any interrogatory respecting it, the only effect of that rule would be to induce the plaintiff to introduce such interrogatories into the bill as would compel the defendant to set out, at great length, the contents of the document in the body of the answer, instead of inserting the title of it in a schedule, and thus would render nugatory the existing practice of giving a schedule of documents, by which much expense and prolixity of proceeding has been avoided. I entertain, therefore, no doubt that the production of documents and the answering interrogatories must, for this purpose, be treated as the same, and that the second question arises, and that the case of Adams v. Fisher must be considered, in conjunction with the other authorities applicable to this point, for the purpose of considering how far, on this answer, the plaintiff is precluded from obtaining the discovery he seeks.

[1] 2 Keen, 754, 3 M. & Cr. 526.

I have, in considering this question, examined all the cases that I am aware of which bear on this point, and I have also perused the various observations and comments of the various writers on this point, the settlement of which is of great importance, for the purpose of avoiding expense and delay in the future prosecution of suits. This point has been very fully and ably considered by the late Vice-Chancellor, Sir J. Wigram, in his work on Discovery, and who cites and comments on the principal decisions which touch on this subject; whose opinions also are entitled to great weight, and who does not hesitate to state that, prior to the case of Adams *v.* Fisher, he had considered that, in cases where the defendant had submitted to answer, the rule of the court was to give to the plaintiff the same full right of discovery before the hearing as he would have been entitled to if his right to relief had been admitted or proved, and the only question between the parties had been the amount of his demand.

It cannot, in my opinion, be denied that a fundamental principle is to be found in all the decisions on this point, which is usually thus stated: that a defendant who submits to answer, must answer fully. That is, that if a *prima facie* case for relief be made by the bill, calling for an answer, the defendant may, if the circumstances of the case will permit it, bring forward any fact or series of facts, by way of plea, to dispute the right of the plaintiff to call upon him to answer either the whole bill or some particular portion of it; but that if he be unable or decline to adopt this course, he must, technically and categorically, answer every statement in the bill to which he is interrogated, which can assist the plaintiff in making out his title to relief. "There is no difference," observes Sir William Grant in Taylor *v.* Milner,[1] "whether the court has determined that the bill is such as the defendant must answer, or whether the defendant has, by his own conduct, precluded himself from raising that question." The importance, as a matter of pleading, of keeping distinct these separate modes of pleading can scarcely be overrated. To determine, on plea or demurrer, that a defendant must answer the bill or a particular portion of it, and then to allow him, by his answer, to contend that he is not bound to answer that very same portion of the bill, would not only be contrary to the rules and practice of the court, but would be repugnant to good sense, and would create much confusion and expense. In truth, this repugnancy it is which created the doctrine which at one time was pushed so far and carried into such minute technicality, viz., that the demurrer or plea were overruled by being coupled with an answer extending to the same matter which was covered by the demurrer or plea.

[1] 11 Ves. 42.

This principle, which, if kept within proper limits, is essential to prevent rules of pleading from falling into inextricable confusion, is not in any degree affected or varied by the cases referred to by Mr. R. Palmer, and of which the case of Wedderburn v. Wedderburn [1] affords a good instance. In that case the defendant had sought by plea to protect himself from answering questions relative to certain partnership accounts. The court, on the argument of the plea, thought that this question could better be determined at the hearing of the cause, when the questions between the parties would be better understood; and accordingly the court directed the plea to stand for an answer, with liberty to the plaintiff to except, but not so as to call for the accounts of the partnership subsequently to the 1st May, 1801, which was the discovery sought to be protected by the plea. This case, and the others of the same class, corroborate instead of weakening the distinction adverted to. If this question could have been raised by the answer, where was the necessity of the plea? a form of pleading which could never have had any existence, if an answer would equally well have effected the same. The decision of the court shows, not that the plea was not proper, or that the same point could have been raised by the answer, but that in this and in other cases of a similar description the court was of opinion that the benefit of the plea might, in the circumstances of those cases, be safely and beneficially reserved till the hearing, which, in truth, admits and confirms the distinction referred to.

It is true that this necessity of answering fully is limited in one or two cases, which do not however weaken or destroy the principle established. Thus, a defendant is not compellable to produce the title-deeds of his property, unless where the production of them is essential for the purpose of making out the title of the plaintiff to the relief he asks; but this is because in the other cases, where, for instance, the recovery of the deeds is the relief sought, as in the case of redemption, a list or description of them is all that the plaintiff can require for the purposes of the suit. So also a defendant is not bound to disclose confidential communications between himself and his solicitor; but this rests on a different principle, and not on the denial of the title of the plaintiff, but on the principle that the plaintiff's right to discovery does not extend to a discovery of the manner in which the defendant intends to support his defence.

It is not my intention to go through the list of authorities on this subject, which are collected, and very ably commented upon, by Sir J. Wigram. It is sufficient for me to say, that although the earlier decisions are not decisive on this point, in Rowe v. Teed,[2] and in Somerville v. Mackay,[3] Lord Eldon expressed his opinion that a defendant

[1] 2 Keen, 782, n. [2] 15 Ves. 372. [3] 16 Ves. 382.

could not answer as to part of a bill and refuse to answer the rest; and Sir John Leach, in Mazarredo v. Maitland [1] and —— v. Harrison,[2] treats this point as settled. In the former case, Sir J. Leach says: "A defendant cannot, by answer, deny the plaintiff's title and refuse to answer as to facts which may be useful evidence in support of that title. He cannot answer in part. If he answers at all, he must answer the whole of the bill;" and so it has, as I believe, always been considered to be, till the case of Adams v. Fisher arose.

I am disposed also to think that it was not intended by Lord Cottenham to carry his decision to the extent that it has been considered to cover. According to the principle supposed to be established by it, if an executor should dispute the right of a legatee, or the debt of the creditor suing on behalf of himself and others, he might resist setting forth the accounts of the estate of his testator, which is a proposition at variance with the uniform and settled practice and decision of the court; but I am disposed to believe that, in truth, the decision in Adams v. Fisher was intended by Lord Cottenham to be limited to withholding the production only of the documents which could not assist the plaintiff in making out his title to the relief he sought; at least the observation made by his Lordship, respecting the admission of counsel to the question put by the court, seems to point to this result. However this may be, the authorities which relate to the subject were not commented upon or brought to the attention of the court; and after the most careful consideration which I am able to give to this subject, I am of opinion that, if the case of Adams v. Fisher goes beyond the point I have last suggested, it is not in accordance with the long line of authorities before decided in this court. As I have therefore to choose between that case and other cases decided by equally high authority, I feel myself compelled to follow those which are, in my opinion, consistent with the principles upon which pleadings in equity can alone be safely and clearly established.

I am, therefore, of opinion that these exceptions must be allowed; but, in the present state of authorities, I shall give no costs on either side.

[1] 8 Madd. 66. [2] 4 Madd. 252.

THE GREAT LUXEMBOURG RAILWAY COMPANY *v.* SIR WILLIAM MAGNAY.

BEFORE SIR JOHN ROMILLY, M. R. JANUARY 20, 1857.

[*Reported in* 23 *Beavan*, 646.]

THIS case came before the court upon exception to the defendant's answer for insufficiency. The outline of the case alleged by the plaintiffs was as follows: —

The defendant, Sir William Magnay, was the director, chairman, and president of the "Great Luxembourg Railway Company." He was also (though the fact was alleged to have been unknown to the company) one of the "concessionnaires" (or parties empowered by the Belgian government to construct the railway on certain terms) of another Belgian railway, called the "Grand Junction."

In 1853, the defendant and his co-directors made reports to the Great Luxembourg Railway Company showing the advantages which would result to them from the acquisition of the "*concession*" of the Grand Junction line, and stating that they had entered into negotiations with the *concessionnaires* of the Grand Junction line, which warranted the expectation that they would obtain from them, on equitable and moderate conditions, the transfer of the "*concession*" which they had obtained from the Belgian government.

On the 17th of December, 1853, the Great Luxembourg Railway Company, relying, as they alleged, on these representations, and in ignorance of the defendant's connection with the Grand Junction, authorized the board of directors "to assume the *concession* of the Belgian Grand Junction line."

But previously, on the 18th of November, 1853, the directors had furnished the defendant Magnay (who was proceeding to Brussels to complete the arrangements as to the acquisition) with 5000 of the guaranteed shares in the Great Luxembourg Railway Company, paid up to the extent of £5 (equal to £25,000), for the purpose of acquiring the Grand Junction line for the Great Luxembourg Company. The defendant went to Brussels and completed the arrangement, but rendered no account of the application of the 5000 paid-up shares. The

plaintiffs alleged that he had parted with them, and had applied the produce to his own use.

The bill stated that the Grand Junction line was not of any value to the plaintiffs; that the plaintiffs had been deceived by the defendant, he having suppressed many material circumstances, and misrepresented others; that in his position of director, &c., of the company, he could not contract with it for any benefit for himself, inasmuch as a confidential relation subsisted between them; that he was a trustee for the plaintiffs of the 5000 shares, and was responsible for the proceeds. The bill alleged that it would appear that the plaintiffs were entitled to the relief sought by the bill, if the defendant would make the discovery required of him. It prayed an account of the dealings and transactions of the defendant with the shares and the proceeds thereof, and that he might be declared a trustee of the shares for the company and proceeds, and that he might "indemnify the plaintiffs in respect of the matters aforesaid," and for payment of the amount found due.

The defendant was interrogated in the usual manner as to the statements contained in the bill, and was required to set forth the particulars of his dealings with the shares and proceeds, which are referred to in his answer, and which it is therefore unnecessary to repeat.

The defendant, by his answer, alleged that his connection with the Grand Junction line was notorious and known to the plaintiffs. He "insisted that the 5000 shares were not placed in his hands as a trustee, or on behalf of the company, but the same were absolutely given to him as the price and consideration for his obtaining a transfer of the Grand Junction *concession* to the Luxembourg Company, free from all expenses in connection therewith, and that, having effected that transfer, he had a perfect right to deal therewith as he thought proper, and was in no way whatsoever accountable to the company or any one else in respect of the shares or any of them." He afterwards stated that he did allege "that he was entitled to the 5000 shares as the price or consideration for the transfer to the Luxembourg Railway Company of the Grand Junction line, and in satisfaction of the engineering and other expenses incurred previous to the transfer of the '*concession*' to the plaintiffs. Having performed the services and effected the purposes as the price or consideration for which the shares were given to him, he insisted that he was in no way liable to account in respect thereof."

The defendant objected to set forth the accounts and particulars required of him, as follows: —

"I submit that I am not bound to set forth a full, true, and particular account of all and every the sum or sums of money which I, or any person or persons by my order, or for my use, has or have received, in

respect of the said 5000 shares, and from whom and for what, and at what particular times each and every part of the said sums which had been so received have been from time to time converted; and how each and every part thereof has been applied, and when, and by whom, and why; and in whose hands the said sums, and each and every part thereof, now are; and what costs and expenses I have properly incurred in respect of the said shares and the proceeds thereof, since the 17th December, 1853, and the particulars of the same.

"I submit to the court that I am not bound to set forth whether I have parted with the whole, or some, or how many of the said 5000 guaranteed shares, or whether or not I have received the proceeds thereof, or to what amount, or whether or not I have made large, or some, or what profits, by dealing with the said shares, or the proceeds thereof, or whether or not I have applied such proceeds or profits, or any part thereof, to my own use. I have wholly refused, and still refuse, to account for the said proceeds or profits, or any part thereof.

"I submit that I am not bound to set forth whether or not the said 5000 shares were parted with by me at divers, or what different times. I deny that there is, in respect of the same, or of the proceeds thereof, or of the payments made and alleged by me to have been made thereout, or my dealings with such proceeds, a long and complicated or any accounts at all between the plaintiffs and myself, or that a large or any balance at all is due to the plaintiffs on such account."

Mr. *Follett* and Mr. *Giffard*, for the plaintiffs, in support of the exceptions. The defendant, having undertaken to answer, is bound to answer fully: Lancaster *v.* Evors;[1] he cannot, by contesting the plaintiffs' right, escape from the obligation of putting in a perfect answer: Swinborne *v.* Nelson;[2] nor can he refuse the accounts by assuming that the plaintiffs will not obtain a decree: Clegg *v.* Edmonson.[3] The plaintiffs, at the hearing, might adopt the account rendered by the defendant in his answer, and thus avoid the delay and expense of a reference for that purpose. The defendant ought to have pleaded to the discovery if he intended to resist giving it.

Mr. *R. Palmer* and Mr. *Hardy*, contra. The discovery asked is consequential or resulting from the character or title of the plaintiffs, and which is denied by the answer. The plaintiffs are not, therefore, entitled to the discovery. Stanton *v.* Chadwick.[4] The plaintiffs are entitled only to such a discovery as will enable them to obtain a decree at the hearing, and the discovery which is the subject of the exceptions is quite irrelevant to the case made; for how can the subsequent dealing with the 5000 shares affect the validity of the original transaction?

[1] 1 Phillip, 349.
[2] 16 Beav. 416.
[3] 22 Beav. 125.
[4] 3 Mac. & Gor. 575.

No answer to these interrogatories can in the slightest assist the plaintiffs in obtaining a decree. The accounts would be oppressive as regards the defendant, and expensive and inconvenient to both parties. The plaintiffs' right to the accounts depends on their right to a decree, and if they should fail, the accounts will be useless. The expression, "answer fully," does not mean that a defendant must answer every question which a plaintiff may choose to ask; but that he must answer those which are material to the plaintiff's case and would assist him in obtaining a decree; it does not apply to matters consequential on the plaintiff's succeeding on the merits. It is said that the defendant ought to have pleaded; but that was impossible, for his defences could not be reduced to one single point. He relies on several defences: first, that he is a purchaser for valuable consideration; secondly, that the transaction has been ratified at a general meeting; thirdly, that the plaintiffs cannot now restore the defendant to the same situation in which he was at the time when the arrangement was entered into; fourthly, that the suit is in respect of a Belgian transaction, over which this court has no jurisdiction; and, lastly, that, by the Belgian law, which governs the case, this transaction is perfectly valid. If the defendant should succeed in either of these, the bill must be dismissed. He has, therefore, five valid defences, any one of which would be an answer to the plaintiffs' case; and he ought not to be in a worse situation, with five answers to the plaintiff's case, than he would be if he had but one single defence, which could be raised by a simple plea.

Exceptions being now heard by the court itself, instead of by the Master, the strict practice is relaxed, and the court has now the power to protect a defendant from being compelled to give useless and oppressive discovery.

The MASTER OF THE ROLLS. I think these exceptions must be allowed. There are many authorities on the subject which cannot be reconciled; but in the cases of Swinborne *v.* Nelson[1] and Clegg *v.* Edmonson,[2] I fully expressed my opinion on this point. I cannot distinguish this case; to do so would be to draw thin and subtle distinctions.

One of the great inconveniences which would arise from relaxing the rule that the person who answers must answer fully, would be this, — that you must hear the merits of the cause with very imperfect means, for the purpose of determining whether the defendant is bound to answer. I do not consider the case of an executor or administrator as any exception to the rule I have laid down, though it has been suggested, that if they dispute the debt or legacy by their answer, they may refuse to set out the accounts.

[1] 16 Beav. 416. [2] 22 Beav. 125.

I do not concur in the observation that since the change of the practice by which exceptions are now heard by the court itself, or by the alteration in the rules of evidence, the right of a plaintiff to discovery is at all affected. The rule of the court is this, that when a defendant answers, he must answer fully; and I think this observation of Mr. Follett is just, — that the plaintiff may, at the hearing of the cause, adopt the account stated in the answer. *Exceptions allowed.*[1]

[1] Affirmed by the Lords Justices, 25 March, 1857.

DE LA RUE v. DICKINSON.

BEFORE SIR WILLIAM PAGE WOOD, V. C. MAY 22, 1857.

[*Reported in* 3 *Kay & Johnson*, 388.]

THE bill sought an injunction to restrain an alleged infringement of the plaintiff's patent for the manufacture of envelopes by means of machinery.

The court, on a motion for an injunction, directed an action, which was tried, and resulted in a verdict for the plaintiff, reserving certain questions of law.

In the mean time, the defendants had put in an answer to the plaintiff's interrogatories.

Those interrogatories sought, amongst other things,—

An account of machines in the defendants' possession, and a discovery from whom the same were procured, and whether they were purchased or hired, and, if purchased, as to the consideration for such purchase.

An account of envelopes manufactured by any machine used by the defendants, and a discovery to whom such envelopes had been sold.

An account of the sales of such envelopes, and of the quantity of envelopes sold by the defendants.

An account of the profits made by the defendants by the use of the machines used by them; a discovery as to the stock of envelopes now in the possession of the defendants manufactured by the said machines.

And an account of the sums of money received by and due to the defendants for envelopes so manufactured.

The defendants, by their answer, admitted that they had in their possession certain machines which had been used by them in the manufacture of envelopes; and that they had manufactured and sold large quantities of envelopes by the aid of such machines. But they denied that such machines, in principle or action, resembled those described in the plaintiff's specification. And, therefore, submitted that they were not bound to answer the matters inquired after as mentioned above.

The plaintiff took eight exceptions to the answer. The first seven referred to the interrogatories above mentioned; the eighth to the concluding interrogatory as to letters and documents, as to which the answer was clearly insufficient.

Mr. *Fooks*, in the absence of Mr. *Rolt*, Q. C., for the plaintiff, contended that if the defence were simply no infringement, it should have been set up by plea, not by answer; and the defendants, having elected to answer, were bound to answer fully.

Mr. *Cairns*, Q. C., and Mr. *Hawkins*, for the defendants, adverted to the inconvenience, not to say impossibility, in patent cases, of raising a defence of this nature by plea, and asked the court to order the exceptions to stand over until the hearing, as had been done by the Lords Justices in two recent and unreported cases, viz., Clegg *v.* Edmondson [1] and Graves *v.* Neilson. The discovery sought was wholly immaterial to the plaintiff's title; the defendants denied that title. If the defendants were right, the discovery sought would be simply useless; if they were wrong, it would be time enough to grant the discovery when the plaintiff's title had been established.

Mr. *Daniel*, Q. C., as *amicus curiæ*, stated that the Lords Justices had recently acted upon this principle in other cases, *e. g.* in Swinborne *v.* Nelson.[2] A usual form of order with their Lordships was this: let the defendant have a month to answer after judgment at law.

Mr. *Fooks*, in reply, contended that if this mode of answering were allowed, an executor, defendant to an administration suit by a creditor, might simply deny that the plaintiff was a creditor, and by that same denial protect himself from making any further discovery. At any rate, in all patent cases it would be useless, in future, to file any interrogatories at all.

Vice-Chancellor Sir W. Page Wood. The general question, viz., whether the plaintiff is entitled to have an answer from the defendants as to the matters comprised in the first seven exceptions, is one of very considerable importance.

The rule on which the plaintiff relies, that a defendant electing to answer must answer fully, is, no doubt, a rule sufficiently well established, and one which, as Mr. *Fooks* contends, has been acted upon in many cases with extreme rigor.

But the ground upon which that rule has always been based is this, that, even if the discovery should prove immaterial to the plaintiff's title, — as would clearly be the case in the present instance, — still it may be important to the plaintiff to have every information bearing upon his rights in this court.

[1] Originally heard at the Rolls, 2 Jur. N. S. 824, but reversed by the Lords Justices. See 3 id. 299.

[2] Not reported.

In a patent case, if the plaintiff once establishes the fact of infringement, his right to a decree involving full discovery of all matters in the nature of those here inquired after, is clear; every thing therefore showing, or merely tending to show, the fact of infringement, must, of course, be set forth in the answer to the full extent of the interrogatories.

But here all the discovery required by the interrogatories in question assumes the fact of infringement, and will be obtained under the decree at the hearing as a matter of course, provided the fact of infringement be then established. While, on the other hand, if that fact be not established at the hearing, the whole of the discovery required will be utterly immaterial, and very expensive to all parties, including the plaintiff.

It is true that the defendant might have protected himself from putting in an answer by a plea denying the fact of infringement. But the question is, whether he was bound so to plead; and I am of opinion that, even if such a plea were practicable, he was not so bound.

It was argued that, if this mode of answering be allowed, it will be competent to an executor, defendant to an administration suit by a creditor, to deny by his answer the fact that the plaintiff is a creditor, and by that bare denial to protect himself from the necessity of making any further discovery. But, in a creditor's suit, there are many intermediate steps which it may be necessary to take, as to all of which an answer may be material. It may be necessary to have a receiver appointed, or to obtain an order for payment of money into court, or to take other similar steps. In a suit like the present, there is nothing of this sort. And it is clear that the right course in such a case is that adopted, as Mr. Cairns assures me, by the Lords Justices, — although I do not find any actual report upon the subject, — and reserve this question until the plaintiff's right has been established at the hearing.

If, at the hearing, the plaintiff's title to an injunction is clearly established, he will then be as clearly entitled to the whole of this discovery under the decree. But, even in that case, an answer will not be necessary, because, without an answer, the plaintiff will obtain all he seeks in the ordinary course of the inquiry in chambers.

If, at the hearing, his right is not clearly established, then, as I said before, the discovery sought will have been simply useless.

In this respect Clegg v. Edmondson[1] is a case clearly in point; for in that case, according to the final decision of the Lords Justices, the plaintiff failed to establish his title. Consequently, had the discovery been granted in the earlier stage of the proceedings, the whole would have proved simply useless.

[1] 8 Jur. N. S. 299.

Equally in point are Lord Cottenham's observations in a case which came before him on this subject,[1] where he says: "If a bill is filed by a person as a creditor, and he asks for all the title-deeds of the real estate, is the plaintiff entitled to see the title-deeds of a person's estate because he calls himself a creditor, which the defendant denies that he is?" Whatever may make out the plaintiff's title, he may have a right to see; but documents not necessary to make out the plaintiff's equity, he is not entitled to see. And the title-deeds of the real estate would clearly, in the case supposed, be unnecessary for the purpose of making out the plaintiff's equity.

In the present case the defendant may rely either on the ground of principle, or on the ground of immateriality; and on either ground he is equally relieved from answering.

Therefore, as to the first seven exceptions, I must direct them to stand over until the hearing. The eighth exception, and the costs of the eighth exception, must be allowed.

[1] Adams v. Fisher, 3 My. & Cr. 526, 545, 546.

LETT v. PARRY.

BEFORE SIR WILLIAM PAGE WOOD, V. C. NOVEMBER 6, 1861.

[*Reported in* 1 *Hemming & Miller*, 517.

THIS was the hearing of a number of exceptions to the answer of the defendant.

The plaintiff was a London solicitor, who had acted as town agent of the defendant (a country solicitor), both before and since the date of the agreement referred to in the bill.

The bill stated that a large sum of money being due to the plaintiff on his agency bills, he brought actions for the purpose of recovering the same; and that such actions were compromised by an agreement, whereby the plaintiff agreed to accept a sum much less than that claimed; and that in consideration therefor the defendant agreed to give the plaintiff the whole of his London agency, and to discontinue the employment of all other agents, and not himself to act as a London solicitor, either on his own account or as agent for others; and particularly to close an office in Serjeant's Inn, Fleet Street, where he had previously transacted business as a London solicitor on his own behalf.

The bill then assigned various breaches of the said agreement, particularly by the transaction of business at the said office in Serjeant's Inn, and prayed that the agreement might be put an end to, and the parties remitted to their original rights; or if not, that the plaintiff might be declared entitled to be paid for all business transacted by the defendant in Serjeant's Inn, or for him by any other London agent, as if he (the plaintiff) had acted as such agent in the said business, and for an account of such business.

The interrogatories, amongst other things, asked for this account. The defendant, by his answer, submitted that he was not bound to set forth the accounts; and such refusal was the subject of the third of these exceptions.

Mr. *Giffard*, Q. C., and Mr. *A. E. Miller*, for the exceptions.

Mr. *Hugh Williams*, for the answer.

VICE-CHANCELLOR SIR W. PAGE WOOD, after allowing the other exceptions, said, —

As to the third exception, the plaintiff has shown a *prima facie* right to the account asked for; but it is plain that the information, if supplied, could be of no use to him before the hearing.

If he succeed in the suit, he must obtain one of two decrees: either the agreement will be then rescinded, in which case he will not be interested in this business at all; or else the account he now desires will be directed by the decree. In neither case can he want this discovery now.

Neither allow nor overrule this exception.

SWABEY v. SUTTON.

BEFORE SIR WILLIAM PAGE WOOD, V. C. NOVEMBER 2, 1863.

[*Reported in* 1 *Hemming & Miller*, 514.]

THE bill stated that upon the marriage of the father and mother of the plaintiff, two indentures of settlement, dated on or about the 15th June, 1829, were executed, settling certain large sums for the benefit of the parents for their respective lives, with remainder for the benefit of their children in the usual way.

It further stated that the defendants, Robert, James, William, and Wadham Sutton, had been appointed and were trustees of these settlements, and had received considerable sums of money in respect thereof, which, or some part thereof, were then in their hands subject to the trusts of the settlements.

The ordinary interrogatories were founded on these allegations, and the defendants above named were called upon to set forth an account of all moneys come to their hands subject to the said trusts.

The defendants twice applied for and obtained further time to answer; and on the 31st July, 1863, they filed a joint and several answer, in which they stated that there was no such indenture as that stated in the bill; and they set forth an indenture, dated 19th March, 1829, which, as they stated, was the settlement made upon the marriage of the plaintiff's parents, and of which Robert and James Sutton and one Phillpotts were the trustees. Under the trusts of that deed the fund was settled upon the plaintiff's mother for life, with remainder among her children, as she and her husband or the survivor should appoint, and in default of appointment equally.

The answer then stated the death of the husband without having made any joint appointment, and that the widow, on the 31st July, 1863, had executed an irrevocable appointment of the entire fund, absolutely excluding the plaintiff.

The defendants submitted that, under these circumstances, the plaintiff had no interest in the settled fund, and that they were not bound to set forth any account.

To this answer the plaintiff excepted.

After the exceptions had been filed, but before they were argued, the defendants Robert and James Sutton died; but all parties agreed that the exceptions should be argued as if they had been exceptions to the answer of William and Wadham Sutton merely.

Mr. *Angelo Lewis*, for the exceptions. The defendants not having pleaded that we have no interest, must answer as if we had established our claim. Reade *v.* Woodroffe.[1]

The appointment which they set up to defeat us was not executed till after they had twice obtained time to answer. Lynch *v.* Lecesne.[2]

Mr. *Rolt*, Q. C., and Mr. *Dickinson*, for the answer.

Part of the exception must certainly be overruled; therefore it must all be so.

The VICE-CHANCELLOR. That used to be so in cases of impertinence, not of insufficiency.

Mr. *Rolt*. Here we deny two different points, and must have pleaded both; but double pleading is not allowed in equity. We say first, there is no such settlement; secondly, the plaintiff has no interest under any settlement.

We are not called upon to answer when the discovery, if supplied, would be inconsistent with the plaintiff's case. De la Rue *v.* Dickinson.[3]

VICE-CHANCELLOR SIR W. PAGE WOOD. The old rule was very strict, that a defendant who elects to answer must answer fully: this has been dispensed with where it has been seen plainly that the point raised is one which must be determined at the hearing; and that the discovery will be unnecessary for the purpose of the hearing, and useless if the decision be in one way; and in a case[4] where there was a *prima facie* right to an account, but it was evident that the result of the account would not affect the question to be decided at the hearing, I have refused to enforce the discovery; and the same course has been taken in cases like Adams *v.* Fisher,[5] where a mere creditor claimed to have a discovery of the title-deeds of the testator's whole estate, and the court refused to permit him to do so. But this is a totally different case, and I see no reason for taking it out of the general rule.

If you choose to rest on a short point, you must do so by plea, or if not, you must answer; but then you must meet the way in which the plaintiff puts his case, and must answer fully every thing which, if answered according to his view, would assist him at the hearing. Here the plaintiff says he is not aware of the exact nature of the instrument, but he gives its date approximately, and then inquires of the defendants

[1] 24 Beav. 421. [2] 1 Hare, 626. [3] 3 K. & J. 388.
[4] See Lett *v.* Parry, 1 H. & M. 517. [5] 3 Myl. & Cr. 526.

whether they have not received moneys in respect of that indenture, or of some other and what indenture, &c., in the usual terms; and they say "there is no such indenture" (but then there is an indenture something like it, under which the plaintiff takes an interest); then they proceed to say, that after the father's death the mother made a will, by which she excluded the plaintiff from all interest in this fund, and that since the bill was filed she has executed a deed having the same effect. That would require much examination at the hearing. It is clear I cannot listen to a statement that there is no such indenture: a mere mistake of the date will not deprive the plaintiff of his right to discovery, the defendants not denying that they were trustees of some indenture; and although they proceed to set out an indenture which does not contain their names, they do not pledge their oath that they are not trustees.

It seems to me that under these circumstances the plaintiff is entitled to have an answer to his interrogatory. It would have been exceedingly easy to have traversed the allegations in the bill if the facts allowed it.

CHICHESTER v. MARQUIS OF DONEGAL.

BEFORE THE LORDS JUSTICES. MARCH 18, 1869.

[*Reported in Law Reports, 4 Chancery Appeals, 416.*]

THIS was an appeal by the defendant from a decision of Vice-Chancellor James, allowing exceptions to his answer.

The bill stated a settlement, dated the 28th of October, 1822, by which certain estates in Ireland were settled (after the determination of certain prior uses which had since determined) upon the defendant for life, with remainder to his first and other sons successively in tail male, with remainder to Lord Edward Chichester for life, remainder to his first and other sons successively in tail male, with divers remainders over. The bill further stated a private act of Parliament, under which part of the settled estates had been sold, and the residue of the purchase-moneys, after discharging certain incumbrances, had been laid out in the purchase of other lands, which were settled to the same uses. The bill then stated a disentailing assurance, dated the 14th of December, 1848, and a resettlement, dated the 23d of July, 1851, by the defendant and his only son, the Earl of Belfast, by which the estates were assured to the use of the defendant for life, remainder to the Earl of Belfast for life, remainder to his first and other sons successively in tail male, remainder to Lord Edward Chichester for life, remainder to the plaintiff (who was the eldest son of Lord Edward Chichester) for life, remainder to his first and other sons sucessively in tail male, with divers remainders over. The bill alleged that this resettlement contained powers enabling the plaintiff in the events therein mentioned to charge the estate with a jointure for his wife and portions for his younger children. The bill stated that the Earl of Belfast had died a bachelor, and that the plaintiff was desirous of making some provision for his wife and any children he might have, and that he could not do so without having recourse to his life-estate in the settled property, or his powers of jointuring and charging portions; that the defendant, as first tenant for life, had possession of the title-deeds and refused to allow him to inspect them, or to give him any information as to the contents thereof, or as to the particulars of the settled estates. The bill prayed that the defendant might be ordered to produce to the

plaintiff and his solicitor the indenture of resettlement, and the other deeds relating to the settled estates, and, if necessary, might be ordered to set forth a full, true, and correct description of the settled property, and to deposit the deeds in court for convenience of inspection.

By the interrogatories filed for the examination of the defendant in answer to the bill he was required to set forth the contents of the deed of resettlement, and the particulars of the estates subject to its uses. He was also interrogated as to documents in his possession.

The defendant, by his answer, did not set out the contents of the deed of resettlement any further than by saying that he was first tenant for life under it, and he declined to state what estates were subject to its uses, or what was the nature of the plaintiff's interest therein. He further stated that the estates comprised in the resettlement had been mortgaged under powers contained in it, and that the mortgage securities now belonged to the executors of the mortgagee, and that the defendant had no access to them. In the 15th paragraph, he also stated that some of the title-deeds were in possession of his London solicitors, Messrs. Cookson, Wainewright, & Co., who held them on behalf of the mortgagees, and the others in the possession of the defendant's Irish solicitor, who held the same on the behalf of the mortgagees; and that the defendant had no control over them, or access thereto. In the 16th paragraph he said that there had lately been in the custody of his solicitors divers documents which purported to be copies, abstracts, or extracts of or from the indentures and muniments of title mentioned in the plaintiff's bill; that such documents were the defendant's own absolute property; and that since the institution of this suit, he had required his solicitors to deliver up to him such of them as purported to be copies, abstracts, or extracts of or from the indentures of the 14th of December, 1848, and the 23d of July, 1851. He went on to say that he had lately destroyed the last-mentioned documents in order to prevent their inspection by the plaintiff, and had kept no list of the documents so destroyed, and could not say, as to his belief or otherwise, what the particulars of the same were. He then stated that he believed that Messrs. Cookson & Co. had in their possession certain documents relating more or less to the settled estates, and including copies, abstracts, or extracts of or from the last-mentioned indentures; but that the defendant did not know the particulars of them, and that the said firm held the documents exclusively on behalf of the mortgagees. In the 17th paragraph he stated his reason for destroying the documents to have been, that he had for years been under a solemn promise not to let the contents of the indenture of the 23d of July, 1851, become known to the plaintiff, and that he was desirous, for other reasons, that the plaintiff should not succeed in this suit.

The plaintiff took exceptions to the answer, which were allowed. The defendant appealed as to the exceptions which related to the contents of the resettlement, and the particulars of the estates comprised in it, and also as to the sixth exception, which related to documents in the defendant's possession.

Mr. *Druce*, Q. C., and Mr. *Cookson*, for the appeal motion, contended that, as to the contents of the settlement and the estates comprised in it, the court would not anticipate the decree by compelling the defendant to give the very discovery which constituted the whole relief sought by the bill, and which was not necessary for the purpose of obtaining a decree. Davis *v.* Earl Dysart;[1] Lingen *v.* Simpson.[2] They urged that the answer as to documents was sufficient.

Mr. *Freeling*, for the plaintiff, was not called upon.

Sir C. J. Selwyn, L. J. We entertain no doubt that the conclusion at which the learned Vice-Chancellor has arrived is perfectly correct.

So far as the case has been argued by Mr. *Druce*, it depends entirely upon a question of principle, he not representing that the defendant has answered fully, but saying that this is an attempt to anticipate the decree, for that the discovery now sought is precisely the same as that which the plaintiff will obtain in the event of his obtaining a decree at the hearing of the cause, according to the prayer of the bill. Now, in a case where the defendant has neither demurred nor pleaded, the general rule universally established is, that he must answer fully unless he can bring himself within some exception to that general rule. Certainly no authority has been cited — and if any authority could have been cited, I am sure it would have been by the learned counsel who have argued in support of this appeal — in favor of the proposition that because the discovery which is sought is the same as that which would be obtained if the plaintiff succeeded in obtaining a decree at the hearing, therefore the defendant is not to give it. Two cases have been mentioned as tending to support that proposition, but in my view neither of them establishes it. Certainly the case of Lingen *v.* Simpson[3] does not, for there the Vice-Chancellor refused the motion, stating that the court "made interlocutory orders for production only upon two principles, — security pending litigation, and discovery for the purposes of the suit." In my judgment this is discovery for the purposes of the suit; and even assuming that it may be identical with that to be given under the decree ultimately to be obtained, still it is necessary for the purposes of the suit. I think the case of Davis *v.* Earl Dysart[4] has still less application. It is true that that case was followed and approved of by his Lordship, the Master of the Rolls, in a subsequent case of

[1] 20 Beav. 405.
[2] 6 Madd. 290.
[3] 6 Madd. 290.
[4] 20 Beav. 405.

Pennell v. Earl Dysart,[1] but I do not think it is an authority in support of any such proposition as is now advanced, and that is made quite clear by the observations of the Master of the Rolls himself in the case of Lady Beresford v. Driver.[2] A perusal of those three cases would convince any one that it was not the intention of his Lordship to introduce any new rule, or to establish any such practice as has been contended for here. Therefore, so far as the matter of principle is concerned, I think the Vice-Chancellor was correct in allowing these exceptions.

Then Mr. *Cookson* has argued another point, namely, that the interrogatory as to documents in the defendant's possession has been fully answered. But, looking at the admissions contained in the 16th and 17th paragraphs of the answer, and considering the admission as to the destruction of the documents, and the taking possession of those documents which the defendant has destroyed, and the possession of certain other documents by those gentlemen who are his solicitors, I entirely agree with the Vice-Chancellor that that interrogatory has not been sufficiently answered. The appeal motion, therefore, will be refused with costs.

Sir G. M. Giffard, L. J. In this case the defendant has neither pleaded nor demurred; but it has been argued that a sufficient reason for refusing the discovery is, that it is an anticipation of the decree. I cannot see why that should be any reason for refusing the discovery, and no case has been cited which supports the view that it is. Lingen v. Simpson[3] was a very different case, because it related to the production of a reference book, and the reference book was the only thing that was to be produced at the hearing, and had nothing to do with the suit antecedently to the hearing; and as a matter of discretion (which I think may be exercised in many of these cases) there might be many and weighty reasons why that reference book should not be ordered to be produced, one being that the plaintiff would have thereby got a great portion of the custom of the defendant. But in this case, in point of discretion, I certainly can see no reason why the plaintiff should not be told what the property is to which he is entitled; and if I had any doubt on the question of discretion, the 16th paragraph of the answer would make an end of all doubt. Again, when the defendant tells us he is under a promise not to give the information, that is a reason why he should be compelled to give it; for unquestionably a promise by a person having the custody of title-deeds not to tell a person entitled under them what the property is, shows that there is need for the court to compel discovery. Therefore I think these exceptions must be allowed, as far as the question of principle is concerned; and I agree that the interrogatory to which the sixth exception relates has not been sufficiently answered.

[1] 27 Beav. 542. [2] 14 Ibid. 387. [3] 6 Madd. 290.

AGAR v. THE REGENT'S CANAL COMPANY.

BEFORE SIR THOMAS PLUMER, V. C. APRIL 26, 1815.

[*Reported in Cooper*, 212.]

THIS case came before the Vice-Chancellor upon exceptions taken to the Master's report upon a reference of the defendant's answer for insufficiency. Forty-nine exceptions had been taken by the plaintiff to the answer. The Master by his report stated that he had allowed the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 23d, 26th, 27th, 29th, 30th, 38th, and 49th exceptions; but with respect to the said 1st, 2d, 3d, 17th, 19th, 20th, 21st, 23d, 29th, 30th, and 38th exceptions he had allowed the same by reason that it appeared to him that the said defendants by their said answer had made discovery in part respecting the several points excepted to, and he therefore conceived that, according to the rules of practice of the court, the defendants were bound to make a full disclosure and discovery. But he conceived the answer to be sufficient in the points excepted to by the 18th, 22d, 24th, 25th, 28th, 31st, 32d, 33d, 34th, 35th, 36th, 37th, 39th, 40th, 41st, 42d, 43d, 44th, 45th, 46th, 47th, and 48th exceptions.

Both parties took exceptions to the report, as to so much of it as was against each of them respectively.

This day the Vice-Chancellor gave his judgment.

After stating the general nature of the bill and answer, he observed that the question brought on by the exceptions to the report was reduced to two heads: first, whether, if points excepted to are irrelevant and immaterial to the points in question in the cause, the Master is competent to consider the materiality or not, or whether he should see only whether it is answered or not. As to this, it is contended that if the defendant does not protect himself by plea or demurrer from discovery, he cannot, by answer, object that questions are not material, unless he has referred the bill for impertinence, which is a course that may be taken where immateriality is objected to the bill. The question whether the Master, upon exceptions for insufficiency, can consider materiality or immateriality, is of great importance because of daily

occurrence. It is, therefore, of consequence that the rule should be understood, in order that the Masters may proceed accordingly. Upon the argument of this case I inquired if there was any direct authority upon this question, whether a defendant could protect himself from discovery on the ground of immateriality, and was furnished with only one case upon it, Selby *v.* Selby.[1] Lord Commissioner Eyre in that case seems to have thought the practice was different in this respect between the Court of Exchequer and the Court of Chancery. I have looked into the register's book in order to see what became of the exceptions in that case; it appears that there were six exceptions, certainly all minute, but which tended, however, to investigate the title; and that all the exceptions were allowed. The party not having protected himself from discovery of his pedigree by plea or demurrer, was obliged to make the discovery. In Sweet *v.* Young,[2] and Jacobs *v.* Goodman,[3] and other cases, the defendant was permitted by answer to resist the discovery. But in no case the question has arisen whether, if the question was wholly immaterial, the defendant can by answer object to the discovery, the above cases being where there was a denial of title. By analogy, indeed, it may be argued that the objection should be taken advantage of by demurrer, like any other defect; and Lord Redesdale[4] gives as one head of demurrer that the discovery is not material; but the direct question upon an answer does not appear to have arisen in any of the printed cases. In the absence of authority I considered it important to consult the Masters for information as to their usual course of practice in this respect; and I have therefore inquired of them, and they have all, without one exception, stated their uniform practice to be, that if the questions are quite immaterial they disallow the exceptions, but if the discovery can in any way assist the plaintiff they allowed the exception. In addition to the authority of the gentlemen filling these offices, and who are all of great character and experience, though it is stated in Lord Redesdale's book[5] that "a plaintiff is entitled to a discovery of the matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree;" yet I have further thought it my duty to communicate with that learned lord himself, who expressed to me that he had not the least doubt that the constant uniform practice of the Court of Chancery in all his time concurred with that of the Court of Exchequer, and with the opinion of the Masters. It may also not be amiss to notice the introduction to every answer, which expresses the answer to be to so much as is material for the

[1] 4 Bro. 11. [2] Ambl. 358. [3] 8 Bro. C. C. 487, note.
[4] Treat. on Plead. in Chan. 155, last edit. See also Cooper's Eq. Plead. 198.
[5] Page 248, last edit.

defendants to answer. A trustee or incumbrancer interested only in part, or heir-at-law, always answers to so much of the bill as applies to him, and need not answer the rest of it. In the case of a bill requiring an admission of assets, or that the defendant may set out an account, if the defendant admits assets, he is not obliged to set out the account. What would be the consequence of driving every pleader to demur? It would be impossible with the greatest skill to do so: in a case like the present must there be forty-nine demurrers, or one demurrer to forty-nine questions, where, if the defendant answers to any thing, he overrules the demurrer; and the material and immaterial parts of a bill, if artfully constructed, are so mixed up as to make it almost impossible to separate and analyze what may be demurred to from what may not. Although, therefore, I have always been excessively cautious and attentive upon the subject of the practice of this court, lest I should be biassed in the long experience I had in another court of equity, where they are constantly deciding on immateriality against exceptions, and where such decisions from the injunction which follows are frequently of the greatest value and importance, and as to which practice there I never remember a doubt being entertained during the period of between twenty and thirty years which I practised there; yet I am clearly of opinion that the practice of the Court of Chancery in this respect is the same. No inconvenience has been known to arise from it, or it would have been corrected by appeal; and I wish, therefore, as far as lies in my power, to put the practice out of all doubt. Secondly, as to the application of it to this case, the Vice-Chancellor was clearly of opinion that the exceptions in this case were all material, and also that the Master was correct in the rule of practice he had stated in his report, that if the party answers in part he must make a full discovery as to that, and that there was no instance of his being permitted to select such part of a question as he chooses to answer, and refuse the rest if material. Taylor *v.* Milner,[1] Dolder *v.* Huntingfield,[2] and all the cases before the Lord Chancellor, state that point clearly. All the exceptions, therefore, taken by the plaintiff to the Master's report were ordered to be allowed, and those taken by the defendant to the report were ordered to be disallowed.

[1] 11 Ves. 41. [2] Ib. 283.

WHITE v. WILLIAMS.

BEFORE LORD ELDON, C. MARCH 4, 1803.

[*Reported in* 8 *Vesey*, 193.]

THE bill was filed by the plaintiff, as heir-at-law and devisee of his father, against trustees under a conveyance by his father in 1769 of estates in the West Indies, alleging that the trusts were all satisfied, and praying a reconveyance and an account and payment of all sums due from the defendants on account of the trust, an injunction to prevent any sale, and the appointment of a receiver and consignee. The bill interrogated as to the total amount of all sums due to and paid by the trustees upon the several particular items.

The defendants set forth an account by way of schedule to their answer, but refused to set forth the totals, as required by the bill, on account of the expense it would occasion to the estate, which they represented to be insolvent. They offered an inspection of books, alleging that, being wanted in the business of the trust, they cannot conveniently part with the possession of them. They insisted that they ought not to be obliged to set forth what was the largest balance in the hands of the bankers, who were also defendants, in every year in respect of the trust, for it would be impossible, without examining throughout the several items, debtor and creditor, and making rests from time to time; but they stated that, to the best of their knowledge and belief, no large balances were ever left for the purpose of enabling them to make a profit, nor was the trust injured thereby, as the interest in arrear to creditors was always more than covered by such balances; and whenever there were any considerable sums at the bankers, they were temporary only, and preserved for the payment of mortgage money and interest thereon, or interest in arrear to creditors, or the usual and necessary purposes of the trust. They also offered an inspection of letters, but insisted they ought not to be obliged to make a schedule, as they were numerous.

A great number of exceptions were taken to the answer, principally upon the objection for not setting forth the totals; and, being all allowed by the Master, between fifty and sixty exceptions were taken

to the report; which, having been argued by Mr. *Mansfield* and Mr. *Hollist* in support of the exceptions, and Mr. *W. Agar* for the report, stood for judgment.

The Lord Chancellor. The plaintiff not only has a right to file a bill upon the supposition that the estate by the effect of the trust has been cleared, desiring a reconveyance upon that ground, and asking whether there have been balances in the hands of the defendants, which he may, even before a decree, move to have paid into court; but it is a wholesome exercise of that right. Secondly, it is not sufficient for the trustees to refuse to give information by their answer further than to enable the plaintiff to go into the Master's office; and it is not enough that the answer gives a ground for an account in the Master's office, and that the plaintiff is enabled to go there. I am clearly of opinion that is not enough; but they are bound to give the best account they can by their answer, referring to books, &c., sufficiently to make them part of their answer. The court would consider the trustees as giving the information very oppressively if they were to set forth a schedule with reference to transactions for twenty years together; but it requires them to refer to books, to give all convenient opportunity of inspection, and to refer to them so as to make them part of the answer, and so as to ascertain whether that is the best account they can give. The plaintiff has a right to compel them by their answer to say that is the best account they can give.

With respect to the totals, the bill charges that it is a free estate, the net produce in each year having exceeded the disbursements. They say they have set forth the totals by leaving the books in the Master's office; but no person could be enabled by this to find out the totals. They ought, then, to state by their answer that they have set forth the totals in the best manner they can. I cannot permit accounts to be thrown into the Master's office, unless the body of the answer contains an averment that that is the best account the defendants can give. The principle upon which I go is, that the plaintiff has a right in a suit for an account to have by the answer, connecting itself with books and accounts referred to as part of the answer, the fullest information the defendants can give him.

To apply that principle to these several exceptions: as to all the exceptions that go to the point of setting out the totals, the Master is right; but I give no opinion whether the trustees are bound to state them otherwise than thus, — that they have laid the accounts, from which the totals will appear, in the Master's office, and that those accounts enable the plaintiff to learn as much as they themselves know of them. But to that extent they must pledge themselves.

LEONARD v. LEONARD.

BEFORE LORD MANNERS, CHANCELLOR OF IRELAND. JUNE 26, 1810.

[*Reported in* 1 *Ball & Beatty*, 823.]

THE bill in this case prayed that a certain deed might be set aside as fraudulent and void; for an account as one of the next of kin of William Leonard deceased; and to be decreed to the possession of the real estate, as his heir-at-law. The defendant answered the bill, and to that part of it seeking an account relied on a deed of compromise as a bar to his rendering such an account. Exceptions were taken to this answer as being short; the Master reported it to be so, and the defendant excepted to his report.

Upon the opening of the case, the Lord Chancellor observed, there was no question so unsettled as this. Lord Thurlow was of opinion that a party should in all cases put in a full answer, except where he is called upon to criminate himself, or defends himself as purchaser for valuable consideration without notice; Lord Rosslyn then followed, and appears to have entertained the same opinion; then follow four cases reported in 11 Vesey, and one in 15 Vesey, wherein Lord Eldon did not decide this question; but I always thought that this defence could not be relied upon except by plea, and so, I conceive, did Lord Eldon.

The *Solicitor-General*, Mr. *Parsons*, and Mr. *M'Kane*, for the plaintiff.

Suppose the plaintiff was a partner in a bank, had been induced to sign a release through fraud, then filed a bill to set it aside, relying on undervalue as evidence of that fraud, would not that be matter of account to which an answer should be put in?

The *Attorney-General*, Mr. *Plunket*, and Mr. *Johnson*, for the defendant.

If a great banking house could not defend itself against an account by alleging that the plaintiff was not a partner, it would be a most grievous hardship upon it; and on interrogatories in the Master's office, in the event of the defence in the answer not being substantiated, the plaintiff can have the full benefit of the discovery he by his bill seeks; and this matter could not be pleaded, being double.

The LORD CHANCELLOR. The answer to Mr. Johnson's argument is this, that the party may die before he goes into the Master's office, or he may by his answer render such an account as would satisfy the plaintiff. But Lord Eldon was, I think, of opinion that this defence could not be relied on by way of answer. There is scarcely any instance where a defendant pleads but he must also answer; it is the best and least circuitous mode of proceeding. I will read a passage from Rowe v. Teed,[1] to show that it decides this question in Lord Eldon's mind. "The question is, whether this is an answer bringing forward such one short fact, or such a series of circumstances establishing in the result one fact, that would be an answer to the discovery and relief." And he concludes with this passage: "But I must repeat that whenever the question comes to a decision it will be infinitely better to decide that in this court the objection should be made by plea rather than by answer." It is impossible to read this without seeing that Lord Eldon was of opinion that this defence must be relied on by way of plea, and not by way of answer.

But it is contended that this defence cannot be relied on by way of plea, as being double. I am of opinion that it may, for several deeds may be put in issue in a plea, they drawing to one conclusion; here it is relied on that a compromise was entered into, and that it is a bar to a discovery. As to the joint tenancy, it appears to me to be a joint trading, where the benefit of survivorship does not arise; and I think that on a plea all these matters could be fairly brought before the court. In all the cases reported in the 11th vol. of Vesey's Reports the Lord Chancellor was of Lord Thurlow's opinion, that the defendant must put in a full answer, except in those cases I before mentioned, — self-crimination, and purchase for valuable consideration without notice. I am, therefore, of opinion that this answer is not sufficiently full.

The exceptions were overruled, and the Master's report was confirmed.

[1] 15 Ves. 376.

WHITE v. BARKER.

BEFORE SIR JAMES PARKER, V. C. JULY 23, 1852.

[*Reported in 5 De Gex & Smale*, 746.]

THE plaintiff in this suit, Mr. Robert Foulder White, was one of the children of James White, who died intestate in 1820. The principal defendants were Mr. Richard Barker, and Margaret, his wife, who had been the widow, and was the administratrix to the estate of James White, her deceased husband. She was also the plaintiff's mother; the other children of the intestate were the other defendants.

Disputes having arisen between the plaintiff and Mr. and Mrs. Barker, this suit was instituted in 1851, seeking an account of the intestate's estate, and for a declaration that the business of the intestate, which Mr. and Mrs. Barker had carried on, and the good-will thereof, formed part thereof, and for an account in respect thereof.

The defendants, Mr. and Mrs. Barker, answered the original bill. Exceptions were taken to this answer, which were argued before the Vice-Chancellor Knight Bruce on the 27th of June, 1851, when, by an order made by consent, the exceptions were overruled, without prejudice to any question in the cause, and the costs of the exceptions were reserved; and the defendant, Mr. Barker, was ordered to produce on oath all the papers mentioned in the schedule to the answer of himself and wife, for the inspection of the plaintiff, and to permit him to make copies and extracts. The defendant accordingly produced all the documents, and the plaintiff and his professional accountant fully inspected them, and made all such extracts as they thought necessary.

The bill was then amended. From the statements therein, it appeared that Mr. White, the intestate, carried on the business of a newspaper and advertising agent in Fleet Street, London; that he died intestate, and that the defendant Mrs. Barker, then Margaret White, the widow of the intestate, obtained letters of administration to the estate of the intestate; and that, in 1832, she married the defendant Mr. Barker; that the business of the intestate was carried on up to the second marriage by Mrs. Barker, but that, during that period, Mr. Barker had interfered in it; and that, subsequent to the marriage, Mr. Barker carried on the business in his own name.

It also appeared that, in November, 1822, new business books were commenced; that, in 1831, the plaintiff, being sixteen years of age, was taken into the office as a clerk, at a small salary; and that, in January, 1837, the defendant Mr. Barker gave one-tenth of the business to the plaintiff, and in 1841, Mr. Barker increased the plaintiff's share to one-fourth; that, in 1843, the plaintiff having married, he purchased another fourth share in the business of the defendant Mr. Barker, paying him £2000 for it, when a deed of partnership between the defendant Mr. Barker and the plaintiff was executed by them.

The accounts of the intestate's estate were made up, and a sum of £1852 11*s.* 4*d.* was paid to the plaintiff as his share thereof; whereupon he executed a release in respect of the estate to the defendants Mr. and Mrs. Barker.

The amended bill contained numerous and very minute interrogatories as to the business and the profits thereof, and the particulars of sums received therefrom or employed therein, and of checks given or paid in carrying on the business, and the names of the persons connected with the transactions or otherwise in conducting the business. The scope of these interrogatories will appear fully in the extract from the defendant's answer inserted below.

The relief prayed by the amended bill was, that it might be declared that the release and deed of partnership of 1843 were fraudulent and void, and that they might be set aside; and for a declaration that the defendant Mr. Barker could not acquire the good-will of the intestate's business, except for the benefit of the plaintiff and the defendants, his brothers and sisters; and that the business and profits formed part of the intestate's estate; and that Mr. Barker might be charged with the £2000 paid by plaintiff to him, with interest, and also with the plaintiff's share of the business of the intestate; and for accounts and general relief on that footing.

The defendants' answer to this amended bill contained the following passage: "This defendant Richard Barker says, and this defendant Margaret his wife believes it to be true, that several of the interrogatories to the said amended bill, and particularly the interrogatories numbered respectively 6, 7, 8, 16, 17, 18, 19, 20, 21, 28, 32, and 33, contain inquiries as to all or some of the matters following; that is to say, the results of accounts relating to the said business, the profits thereof, or of some part or parts thereof, the particulars of sums received therefrom or employed therein or taken out therefrom, or of checks given or paid in carrying on, or the names of persons connected with or receiving money from, or entries made in the books of or otherwise relating to, the said business, or the profits thereof, or the mode of conducting the same; and these defendants say, that they are unable to answer such inquiries, and humbly submit they cannot be required

so to do, for the reasons following, which reasons are hereinafter referred to as the 'several reasons hereinbefore given;' that is to say, that the said inquiries relate to a vast number of particulars, all of which particulars relate to matters which occurred many years, and more than seven years, ago; and these defendants, R. Barker and Margaret his wife, have no means of ascertaining these particulars mentioned or inquired after by such inquiries, except by the books in the possession of the defendant R. Barker, which books are numerous, and amount to upwards of eighty in number, and extend over a long series of years, and the books in the office of the said business in Fleet Street, which are in the joint possession of the said plaintiff and this defendant R. Barker, about sixty in number; and this defendant R. Barker says, that he is willing to produce all the said books which are in his own possession, and which are all particularly described in the second schedule to the said former answer of these defendants, for the inspection of the said plaintiff and his accountant or accountants; and is also willing to permit, and has never interfered with, the inspection by the said plaintiff and his accountant of all the said books in the joint possession of the said plaintiff and this defendant R. Barker, and which latter books are also very numerous, and extend over a series of years; and, in fact, all the said books, as well those in the possession of this defendant R. Barker as those in such joint possession as aforesaid, have from time to time, when required, been produced, at all reasonable times, to a Mr. Franklin, an accountant employed by the said plaintiff, and such accountant was engaged, as these defendants have been informed and believe, for a considerable period in the year 1850 in inspecting some of the said books in the joint possession of this defendant R. Barker and the said plaintiff, and was employed from the latter end of the month of July last for several months in inspecting all these said books in the sole possession of this defendant R. Barker, as well as many of the said books in the joint possession of the said defendant and the said plaintiff; all which last-mentioned books have also been produced since the said month of July last for the inspection of the said Mr. Franklin, who, as these defendants are informed and believe, has, during that period, made copies of various parts of several of the books so produced for his inspection, and also very many extracts therefrom. And these defendants say that they are not professional accountants, and they believe it would require a professional accountant several months' continuous labor to ascertain from the said books such of the various particulars inquired after by the said amended bill, or mentioned in such inquiries, as can be ascertained therefrom. And this defendant R. Barker says that he believes, and this defendant Margaret his wife is informed and believes, that the books relating to the said business, from the time of the marriage of the defendants till the

present time, were ordinary business books; and that all matters relating to the said business, and usually entered in respect of businesses of a like nature, were, as these defendants believe, regularly entered therein; and that all the books of the said business, from the said 1st of November, 1822, to the present time, are now in existence and ready to be produced to the said plaintiff; and that the said plaintiff, as well by himself, he having for many years, namely, from 1837 to the present time, been engaged in making entries in the said business books, and having had access during a great part of that period to all such of the books of the said business as were kept before 1837, as by his said accountant, who has had such inspection as aforesaid, has had ample means of informing himself of the contents of all such books. And these defendants humbly submit to this honorable court, that it would be oppressive and unreasonable, and would lead to no satisfactory results, to require these defendants, or either of them, to go through the said books themselves; and that it would lead to great and useless expense if they were to employ an accountant so to do, inasmuch as they could only state the results which such accountant had arrived at, the accuracy of which results they would not be able to test without going through the said books themselves. And this defendant R. Barker says, that he has attempted to make out from the said books the necessary accounts to enable him to answer the interrogatories in the said amended bill, and had also endeavored previously to make out some of the said particulars, as will appear by an inspection of the papers contained in the bundle referred to in the said second schedule to the said former answer of the defendants, a particular description of the contents of which bundle has since been verified by affidavit by this defendant R. Barker; but this defendant R. Barker says, that the results stated in many of such papers are not accurate; and although he has endeavored to make out such accounts as aforesaid, he has found it so difficult, from the immense length and particularity of such accounts, for him to make out the accounts required in order to answer the inquiries in the said amended bill, that, after employing much time and labor, he has felt himself unable to do so, and has been compelled to desist from the attempt; and these defendants say that they do not know, and are unable to set forth, as to their belief or otherwise, and humbly submit that, for the several reasons hereinbefore given, they cannot be required to set forth what sums or sum this defendant R. Barker received in respect of, and in any and what way connected with, the said business in the year 1822, or how he applied the sums or sum which he so received, or in what particular books there were or are, or was or is, any and what entries or entry in respect thereof, except that this defendant R. Barker believes that all such sums that were received on and after the 1st of November, 1822, are regularly

entered and accounted for in some of the said books in his own possession, and in the joint possession of himself and the said plaintiff; and that the only entries in respect thereto are in the following books, mentioned in the second schedule to the said answer of the defendants to the said original bill, viz., the cash books, Nos. 8, 9, 18; the cash, bill, and banker's account book, No. 36; and the general cash book, No. 39; and probably in some other of the said books relating to the said business, which the said defendant R. Barker cannot specify; but as to the particulars of all such entries the defendants crave leave to refer to the said books. And these defendants humbly submit that they cannot be required to answer further the sixth interrogatory to the said amended bill, for the several reasons hereinbefore given."

The plaintiff, by his first exception, excepted to this part of the answer.

Mr. *Russell* and Mr. *Giffard*, for the exceptions.

Mr. *Malins* and Mr. *Jessell*, for the defendants.

White *v.* Williams [1] was cited, and Mitford on Pleading [2] was referred to in the course of the argument.

The VICE-CHANCELLOR said: If the question were as to the technical and formal sufficiency of this answer, it is very possible that the court would allow this exception. In this case these defendants were required by the bill to set forth the accounts in question in the suit, with a measure of detail which they state on their oath would involve a most oppressive amount of labor, and would also occupy much time; and it is urged by these defendants that the plaintiff himself, by exercising a certain amount of labor and attention, would be able to obtain all the information which he seeks. Now, the court is bound to consider what object the plaintiff would gain by compelling these defendants to incur the labor he requires of them. These defendants have stated where the materials may be found for obtaining the information sought, viz., in the books and papers mentioned in the schedule to their answer. They say that the plaintiff has always had access to these documents, and that they have been investigated by his accountant. It is not alleged by the plaintiff that any thing has been fraudulently or erroneously inserted or omitted. No object would be gained by compelling these defendants to give all the accounts in detail in the manner asked for by the bill.

This exception must be overruled, the costs to be costs in the cause.

There were fourteen other exceptions, which involved similar questions, and were not pressed.

[1] 8 Ves. 193. [2] Pages 309, 310.

CLEGG *v.* EDMONSON.

February 13, 1818, plaintiffs and defendants entered into articles of co-partnership for the working of certain copy-hold and certain free-hold mines, some of the partners having a lease of the former which would expire September 29, 1826, and the others having a lease of the latter which would expire November 29, 1831, the partnership to continue until the last-named date. The articles contained an agreement that if any of the partners, at or before the last-named date, should obtain a new lease of any of the mines, it should enure to the benefit of all.

Before the expiration of the lease of the copy-hold mines, a new lease of them was obtained for twenty-one years from September 29, 1825.

When the lease of the free-hold mines expired, no renewal was obtained, but the lessees held over with the consent of the lessor, and thus the partnership went on until the expiration of the new lease of the copy-hold mines, September 29, 1846.

July 6, 1846, defendants, who were the managing partners, gave plaintiffs notice of dissolution on the 30th of September following. September 29, the stock-in-trade and effects were sold by defendants at auction, notice being given to plaintiffs, and bid in chiefly by defendants.

August 12, 1846, defendants agreed with the lessor for a new lease of both the copy-hold and the free-hold mines for twenty-one years from September 29, 1846, which lease was made on the 11th of December following.

The foregoing proceedings in 1846 were in pursuance of a plan formed by defendants to obtain a new lease for their own benefit, excluding plaintiffs from any participation therein.

Plaintiffs always claimed that they were entitled to participate in the new lease, but they did nothing until September, 1855, when this bill was filed; by which plaintiffs sought an account of the profits of working the mines under the new lease, and payment to them of their share, the mines having been uniformly worked with profit.

Defendants by their answer denied plaintiffs' right, and refused to give an account, or to produce documents which related exclusively to what had taken place under the new lease. The case came on upon exceptions to the answer, and, by arrangement, as to the right to production.

The foregoing statement is taken in part from the report of the case on the merits in 8 De G., M., & G. 787.

CLEGG v. EDMONSON.

BEFORE SIR JOHN ROMILLY, M. R. APRIL 16, 1856.

[*Reported in* 22 *Beavan*, 125.]

THE facts of this case were very complicated, but the following statement is sufficient for the purpose of explaining the decision, which is merely one of pleading and practice.

The plaintiffs and defendants were interested in some leasehold collieries, which were worked upon the terms of articles of partnership, dated the 13th of February, 1818. By these articles the partnership in working the collieries was to continue during the remainder of the lease, of which about fifteen years were unexpired. The articles contained an agreement "between all the parties, that in case any one or more of them should, at or previous to the expiration of the said term of fifteen years, obtain or procure any fresh or renewed lease of all or any of the mines, seams, and beds of coals or collieries within the said township of Cliviger, such lease, and all interest, benefit, and advantages to arise or accrue therefrom, should belong to and be enjoyed by all and every of the parties thereto, their respective executors, administrators, and assigns, in such shares and proportions as were thereinbefore expressed."

The partners worked the collieries, and having, during the fifteen years, obtained a renewal, they continued to work the collieries, which were managed by James Collinge, on behalf of all parties, who was paid a salary for his services.

On the 6th of July, 1846, shortly before the expiration of the principal lease (29th September, 1846), the defendants gave the plaintiffs notice to dissolve the partnership on the 30th of September, 1846. On the 29th of September, 1846, the whole stock of the collieries was sold by auction, and purchased principally by the defendants.

On the 11th of December, 1846, the defendants (in pursuance of arrangements made with the lessor on the 11th of December, 1846) obtained a new lease of the collieries. They continued to work the same, and made a considerable profit. The plaintiffs, by this bill, sought, in substance, to participate in the benefits of the new lease

and the profits of the working of the collieries. It alleged that previous to the expiration of the old lease the renewal was a matter of consideration amongst the parties, and that it had been agreed by all parties consulted that it was expedient to obtain a new lease. It alleged that applications had been made to the lessor, who was not unwilling to grant a renewal, and a promise was obtained from him of the grant of a new lease, as soon as some preliminary arrangements with his superior landlord could be perfected.

The bill alleged that the defendants had previously formed a scheme to appropriate the new lease to their own use, and exclude the plaintiffs therefrom, and that such transactions were in violation of their duties towards such parties, as well under the articles as independent of them, and was a fraud on the parties sought to be excluded.

It alleged that the defendants had in their possession books and papers, &c., "connected with, mentioning, referring, or relating to the matters therein mentioned, which they refused to produce."

The bill prayed declarations that the renewed lease was subject to the articles of 1818, that the dissolution was not binding, that the plaintiffs were entitled to share in the partnership, and it prayed for an account of the machinery, &c., and of the profits of the mines, and other consequential relief.

The 18th interrogatory asked for an account of the profits of the mines "since the transactions of the year 1846," and for the accounts in writing, showing the divisions of profits and the existence of undivided profits. The 24th and 25th interrogated as to the possession of documents, and required a schedule thereof.

The defendants denied the plaintiffs' right, and, in answer to the 18th interrogatory, "submitted that they were not bound to answer the 18th interrogatory, until the plaintiffs had established (and which they denied) that they had some right or interest in the new partnership." They admitted they had made profits, and they said "that to state such account of profits as was required by the 18th interrogatory would involve great labor and expense, and the dissection of voluminous accounts, extending over many years, relating to matters in which they submitted the plaintiffs had no interest whatever."

As to the books and papers, they referred to their affidavits made on the subject, under the 15 & 16 Vict. c. 86, § 18, and insisted that they were not bound to produce those in the second part of the first schedule, believing that they did not "tend to show the plaintiffs' right to a decree in this suit, but related exclusively to matters in which they submitted and insisted the plaintiffs had no interest." In their affidavit they said they were advised and believed that those documents would not assist the plaintiffs in making out their title to the decree

prayed by their bill, inasmuch as they related exclusively to the business since the year 1846, and in which they denied that the plaintiffs had any interest whatever, and which documents contained no entries whatever relating to any business transactions prior to the 29th day of September, 1846. And they submitted that the plaintiffs were not entitled to the production thereof, until they had established (and which they denied) that they had some interest in the lease or the workings of the said collieries.

The case came on upon exceptions, and by arrangement as to the right to production.

Mr. *R. Palmer* and Mr. *Little*, for the plaintiffs. The defendants have neither pleaded nor demurred to the bill; they have undertaken to answer, and the rule is perfectly settled that if a defendant answers at all, he must answer fully. Mazarredo *v.* Maitland.[1] He cannot, by denying the plaintiffs' title to relief, escape the discovery. Adams *v.* Fisher[2] was a case of production and not of discovery, and has not been followed. Swinborne *v.* Nelson;[3] and see Whistler *v.* Wigney.[4] . . .[5]

Secondly. It cannot be said that the discovery is immaterial, for the plaintiffs may, at the hearing, adopt the accounts so given, and then take a decree on the footing of the accounts rendered by the answer, thus avoiding the necessity of a reference to take the accounts. This appears from Rowe *v.* Teed.[6] . . .[7]

They also referred to Wedderburn *v.* Wedderburn;[8] Morrice *v.* Swaby.[9]

Mr. *Selwyn* and Mr. *Roxburgh*, for three defendants; and Mr.

[1] 8 Mad. 66. [2] 8 Myl. & Cr. 526. [3] 16 Beav. 416.

[4] 8 Price, 1. [Before Richards, C. B., December 14, 1819. "Exceptions were taken to the defendant's answer. One of them was, that the defendant had not set forth an account of the tithable matters taken by him, the tithes of which were sought to be recovered by the plaintiff's bill.

"*Hone*, in support of the answer, submitted that where the defendant resisted the plaintiff's claim to the tithes in kind, by setting up, as in the present case, a defence of composition, the effect of which, if proved, would be to show that the plaintiff was not entitled to an account, it was not a ground of exception to the answer that it did not in the first instance set forth an account of tithable matters.

"The Lord Chief Baron. — It is a general rule of equity that if a defendant answer at all, he must answer fully. It has been frequently held that defendants must set forth an account in their answers, notwithstanding they set up a defence of composition or modus." *Exception allowed.* — Ed.]

[5] The learned counsel here stated Anon. *v.* Harrison, 4 Madd. 252. — Ed.

[6] 15 Ves. 372.

[7] The learned counsel here stated Rowe *v.* Teed, and quoted from White *v.* Williams, 8 Ves. 194. — Ed.

[8] 2 Keen, 782, note. [9] 2 Beav. 500.

Roupell and Mr. *Giffard*, for a fourth defendant, who had severed in his defence.

We admit that when a defendant answers, he must answer fully; but the real question is, what is a full answer? There must be, and is, some limit to the discovery to which a plaintiff is entitled. It must be material to the title of the plaintiff, and tend to assist him in obtaining a decree. In Wood *v.* Hitchings,[1] it was held that the rule that where a defendant submits to answer, he must answer fully, does not apply where the matter of discovery is immaterial to the relief sought by the bill. The accounts cannot assist in making out the plaintiff's right to a decree, and they must be subsequently taken. In matters of this sort the court exercises a discretion. As to the discretion of the court in such cases, Lord Redesdale observes:[2] "Where a discovery is in any degree connected with the title, it should seem that a defendant cannot protect himself by answer from making the discovery; and in the case of an account, required wholly independent of the title, the court has declined laying down any general rule, deciding ordinarily upon the circumstances of the particular case." If there were no discretion, by a mere allegation of partnership, skilfully supported by other facts so as to prevent a plea or demurrer, the whole of the voluminous accounts of a banker or merchant might be insisted on by a mere stranger. In Jacobs *v.* Goodman,[3] it was held that "a defendant need not set forth an account of the transactions of a trade, in which the plaintiff pretends to have been a partner, if there is a clear denial of the partnership." The Chief Baron said: "You are not entitled to an account unless there be a partnership, and your position is much too wide. At that rate, if an utter stranger were to file a bill against Child's shop, alleging a partnership, it could not be sufficient to deny that any such partnership existed. There may be cases where the court will require an account, although the principal point in the bill is denied, but not in a case like this." This court will not, at this stage of the cause, allow a defendant to be hampered by setting forth long and expensive accounts, which may turn out to be of no use, and may be required for the mere purpose of oppression. . . .[4]

It is clear, from the observations of Lord Cottenham in Adams *v.* Fisher,[5] that he did not consider a plaintiff entitled to the production of documents where his title was denied, and the documents did not support that title.

Lord Redesdale, alluding to this point, says:[6] "Thus, to a bill

[1] 3 Beav. 504. [2] Page 312, 4th ed. [3] 2 Cox, 282.

[4] The learned counsel here stated Donegal *v.* Stewart, 3 Ves. 446; Attorney-General *v.* Thompson, 8 Hare, 106; and Stainton *v.* Chadwick, 3 Mac. & Gor. 575. — Ed

[5] 3 Myl. & Cr. 544. [6] Page 312.

stating a partnership, and seeking an account of transactions of the alleged partnership, the defendant by his answer denied the partnership, and declined setting forth the account required, insisting that the plaintiff was only his servant; and the court, conceiving the account sought not to be material to the title, overruled exceptions to the answer for not setting forth the account."

Sir James Wigram refers to the same point. He says:[1] "First. Suppose the bill to state certain transactions in trade which had in fact been carried on by the defendant, and to allege (untruly) that the plaintiff was a partner with the defendant in those transactions. Suppose, further, the bill to contain a charge that the defendant had in his possession books and papers relating to the transactions in question, and that, if the same were produced, the truth of the plaintiff's allegation as to the partnership would thereby appear. Shall the defendant, by answer admitting the trading transactions, but denying the partnership, be compelled to produce his books and papers relating to his private transactions because the plaintiff has alleged that they will evidence his case?" He subsequently refers to a defence to such a bill by plea, accompanied by an answer, and observes:[2] "If an answer be necessary, the nature and extent of that answer must be the same, whether the defence be made by demurrer, plea, or answer. It follows, therefore, that unless in such cases the defendant be permitted by answer to demand the judgment of the court, whether he should give the discovery or not, he must be wholly without the means of defending himself, although the plaintiff might have no right to the discovery objected to."

"In the example first suggested, that of an alleged partnership denied by the answer, the plaintiff is supposed to seek discovery in support of the case upon which he founded his title to relief. No reported case suggests itself to the author precisely applicable to the example proposed; but he submits, without any hesitation, that the defendant would not, in such a case, be compelled to produce documents relating to his transactions in trade before the hearing."[3]

The present suit is so framed as not to be open to a demurrer, and the complexity is such that it would be impossible to plead to it. Seeing that the defendants are compelled to answer, and the utter inutility of the accounts in order to support the plaintiff's case at the hearing, the court, in the exercise of its discretion, ought not to allow them to be insisted on at this stage of the cause.

By the 38th Order of August, 1841,[4] a defendant may, by answer, protect himself from giving discovery.

[1] Wigram on Discovery, 2d ed. p. 221.
[2] Ibid. p. 223.
[3] Ibid. p. 224.
[4] Ordines Can. 175.

The case of Anon. v. Harrison[1] is very shortly reported. There must have been a charge in the bill, which is adverted to in some of the cases, that the production of the account would make out the fact in dispute, viz., the partnership.

They cited the Marquis of Donegal v. Stewart;[2] Phelips v. Caney;[3] Webster v. Threlfall;[4] Lancaster v. Evors.[5]

They also contended that the facts showed that the dissolution was valid and effectual, and that the plaintiffs, after the great laches, could not maintain the claim to participate in the profits of a mining concern, which was of an uncertain and perilous nature. On this they cited Norway v. Rowe;[6] Prendergast v. Turton;[7] Senhouse v. Christian.[8]

The MASTER OF THE ROLLS. In this case I am of opinion that the defendants must answer this bill. I shall not go at all into the consideration of whether the plaintiffs will be entitled to any decree at the hearing of this cause, or into any question with respect to lapse of time, or the particular facts of this case upon which the defendants found their defence, further than as they bear upon the question whether the defendants are bound to answer the bill or not.

It is a general principle that a defendant who answers must answer fully. That is admitted to be a general principle; and therefore it lies upon a defendant to show that his particular case comes within some exception to that general rule. When a defendant does not demur to a bill, he may be taken to admit that if all the facts which are alleged in the bill are proved, as there alleged, and nothing shown to displace the effect of them, the plaintiff will be entitled to some relief. So, also, if he dispute the case of the plaintiff by the introduction of a single fact, or by separate facts leading to one general issue, then the proper defence to make is by plea; but if he answer, the rule is that he must answer fully. It is admitted that there are many exceptions to that rule; and the question is, whether this case comes within any of those exceptions. One very common exception is where the defendant sets up a distinct title in himself, totally independent of the title of the plaintiff, and which, if established by evidence, will destroy the title of the plaintiff. In such a case he is not bound to produce or set out any documents which, as he swears, establish his own title, and do not establish the title of the plaintiff. There is a great number of cases, no doubt, in which the plaintiff states that there are documents in the defendant's possession which establish the plaintiff's title; but if the defendant swear positively that those documents do

[1] 4 Madd. 252.
[2] 3 Ves. 446.
[3] 4 Ves. 107.
[4] 2 Sim. & Stu. 190.
[5] 1 Phillips, 349.
[6] 19 Ves. 158.
[7] 1 Younge & C. (C. C.) 98.
[8] 19 Beav. 356, note.

not relate to the title of the plaintiff, but that they establish the title of the defendant, the court gives credit to the allegation in the answer, and the defendant is not bound to produce those documents. I state those cases because I adhere to the observations I made in Swinborne *v.* Nelson, that, in my opinion, questions of exceptions to answer and of production of documents rest on the same grounds, and that they must be dealt with in the same way.

There are other cases, but it is unnecessary for me to go through them; one exception is this, where the answer would subject the defendant to particular penalties or forfeitures; that is also an objection which may be taken by answer.

The case which arises here is this: a title is set up in the plaintiffs which is denied by the defendants; it is then said that, the title being denied by the defendants, the plaintiffs are not entitled to any of the relief consequent upon that denial, nor are they entitled to any discovery except such as shall aid in making out their title. There is a good deal of obscurity in the cases as to what is meant by "making out the plaintiff's title." I apprehend it means the title to the relief which he seeks by his bill. In the ordinary case of a plaintiff coming against the person in possession of an estate, alleging that the owner last seised died intestate, and left the plaintiff his heir-at-law, if the defendant denies that the plaintiff is his heir, he is not bound to set forth any of the deeds or papers in his possession which show his title to the property, provided he is prepared and able to support his resistance to the production of those documents by swearing that they in no respect make out the title or heirship of the plaintiff. That is an ordinary case.

In the case of a partner, Lord Redesdale, in the passage which Mr. Roupell has cited to the court, says "that the court has declined laying down any general rule, deciding ordinarily upon the circumstances," that is, on the facts of the particular case. And a passage has been cited by Mr. Giffard from Sir James Wigram's book, in which I am fully disposed to concur, namely, that if a plaintiff were to file a bill against a certain person carrying on trade, alleging a partnership and asking for the accounts, and the defendant denied the partnership altogether, and at the same time said that the accounts did not show any partnership whatever, he might be able to protect himself as well by answer as by plea.

But the present appears to me to be very distinct from that case. In the first place, this is not a case in which the partnership is denied, that is to say, the original partnership; but, on the contrary, the original partnership is admitted. If the answer here had said, "the plaintiffs never were partners in the carrying on of this mine, and they

never had any thing to do with it, but were mere strangers to the whole transaction, and we have no documents or papers in our possession to show the contrary in any respect whatever," then I am disposed to think that the case would have arisen which is stated in Sir James Wigram's book, and which, in fact, is what has been principally argued at the bar on behalf of the defendants, with great ability and very strenuously, but which, in my opinion, does not arise in the particular facts of this case. In this case, the original partnership being admitted, if that is not dissolved, the whole of the trade which has since been carried on has been so carried on for the benefit of the persons who are partners.

Then it is said that the partnership has been put an end to, under such circumstances as do not entitle the plaintiff to be treated as a partner or as a *cestui que trust*, in respect of the business carried on subsequently to a particular period. The business has never been intermitted, as I understand from the statement on both sides: the business has been carried on from the time when it is admitted that the plaintiffs were partners continuously down to the present time. The defendants, however, allege that at a particular time the right of the plaintiffs ceased, and the profits of the trade belonged exclusively to the defendants. That is a case for them to establish by evidence, and if they had said, we have in our possession certain documents which establish our case, but do not in any respect assist the case of the plaintiffs, that might be a reason why I should not require the defendants to produce what was merely the evidence required to support their case at the hearing of the cause.

It is to be observed that a considerable distinction exists in these cases. I may refer to one in the matter of tithes, which, according to my recollection, is one of the cases that Lord Redesdale refers to. If a person file a bill for an account of the ordinary tithes to which the rector would as of right be entitled, the defendant is bound to set out not only an account of the lands, but an account of the tithes, and it is not sufficient for him to deny the title of the plaintiffs; but if the title to the tithes is not a matter of common right, but depends upon a particular custom, such as tithes of fish or rabbits, then the same rule does not apply; but a denial of the right of the plaintiff puts him upon the necessity of establishing his right, and it is not incumbent upon the defendant to set out the same account of tithes. According to my recollection, that distinction is taken by Lord Redesdale in his book upon this subject.

It is to be observed, therefore, that this is not a case in which the original title to relief of the plaintiffs is denied, but in which a separate and distinct title is set up for the purpose of showing that the

right of the plaintiffs stopped at a particular period: therefore, in my opinion, this is not a case in which authorities can be referred to (if such authorities exist, and are not overruled at the present day) for the purpose of showing that a denial of the plaintiff's title constitutes a right in the defendant to withhold any information of the subject. This is not a denial of the title of the plaintiffs, but an assertion of something which, at a particular period, concludes and displaces an admitted title in the plaintiffs, and which is, therefore, perfectly distinct from that class of cases which have been referred to.

If necessary to refer to them, I think that it would be difficult to distinguish this case from Rowe *v.* Teed, to which this case bears a strong resemblance in many respects, although they are perfectly distinct with respect to the subject-matter.

It is then contended that the plaintiffs are not entitled to this discovery, because it will be immaterial at the hearing of the cause, and that, therefore, the defendants may resist the production of the information. But what I understand by that is such a case as Webster *v.* Threlfall, where, whatever information you give by the answer, it can in no degree assist the plaintiffs in obtaining a decree at the hearing. But this case does not fall within that principle, because, assuming that the plaintiff, at the hearing of the cause, proves the existence of the partnership and the amount of his share, and that he thereby establishes his title to the relief which he seeks, he may be entitled to say, "I will take a decree for the amount of profits admitted by the defendants, without taking the account;" or he may find, by the answer the amount of profits so small that it may not be worth his while to proceed with the suit. That cannot be stated to be immaterial to the plaintiffs' case. The observation of Lord Eldon, in the case of Rowe *v.* Teed, expressly meets this particular point, on the principle that the court is desirous of giving complete relief at the time when it pronounces the decree in the first instance; for an account is only directed, because the court finds its inability, upon the evidence before it, to give complete relief. In many cases the court has that power, as in the case of a creditor who proves his debt at the hearing against the executors who admit assets, in which case the creditor is entitled to a decree at once, without the expense or trouble of going through the accounts.

The defendants have failed in satisfying me that it would not, under any circumstances, be possible to give that relief on the present occasion. I admit the improbability, in a case of this description, of giving such relief; but in looking at cases of this nature and deciding them upon principle, I must consider, not the extent of probability, but whether it is not possible for the court to give such relief. The

plaintiff states what is the amount of his share; I assume for this purpose, as I am bound to do, that he establishes at the hearing what the amount of his interest is, and who are the other persons interested, and that then he shows, by the answer of the defendants, the amount of profits which have been made: he may then say, "I will take my proportion, whatever it may be, at once, and the other persons interested may then either accede to that amount or take the accounts." The plaintiffs might then take their share of what the defendants were willing to admit was the amount of profits they made.

I am of opinion, therefore, that this is a case in which the defendants are bound to give the information which is required by the bill, and also to produce the documents mentioned in the particular schedule.

READE *v.* WOODROOFFE.

BEFORE SIR JOHN ROMILLY, M. R. NOVEMBER 4, 1857.

[*Reported in* 24 *Beavan*, 421.]

THIS case came before the court upon exceptions to the answer for insufficiency.

The plaintiff and the two defendants were solicitors. The bill stated that in April, 1848, it was agreed between them that the defendants should carry on, in their own names, the business of the London clients of the plaintiff, as agents for him, on the terms of the plaintiff being entitled to half of the net profits arising from such business, and the defendants to the other half. That the plaintiff accordingly delivered over the papers, and introduced his London clients to, and recommended them to employ, the defendants, which they accordingly did.

The plaintiff complained that the defendants had not accounted to him for the profits, although they had sent him an imperfect account on the 7th of February, 1851, with a letter, stating, "As you have now returned to town, we shall be glad if you will apply to the several parties and take the papers out of our hands, *as we do not purpose longer to continue to carry on their business upon agency terms.*"

The bill alleged that the plaintiff remonstrated, and that, in consequence, the defendants continued to carry on the business on the same terms as before. It prayed a declaration that the defendants were liable to pay the plaintiff a moiety of the profits, and sought an account thereof down to the 1st of January, 1856, and an account of all dealings and transactions between the plaintiff and the defendants.

The interrogatories contained searching inquiries as to all pecuniary dealings and transactions between the parties since July, 1850, and an account of all moneys advanced to the plaintiff and paid to the defendants, "distinguishing the name of the client, and on what business the same was paid, and what balance was due, and an account of all profits made in every year since July, 1850, in respect of the business of the plaintiff's London clients, distinguishing the amount of profits made in respect of the business of each client, &c., &c. They required the defendants to set out the clients introduced, and the particulars of

their employment, and the particulars of the documents in the defendants' possession.

To this bill the second-named defendant, by his plea and answer, pleaded the plaintiff's insolvency as to matters prior to the 31st of July, 1850. He stated and insisted that the above arrangement had been finally determined on the 7th of February, 1851, by the letter of that date, and he denied that the business had after that time been carried on upon agency terms. He set forth accounts between the insolvency and the 7th of February, 1851, but declined to set forth the subsequent accounts, or to state whether he transacted business since the month of February, 1851, for any of the plaintiff's clients.

The answer to the interrogatory as to the possession of books and papers was clearly insufficient.

The plaintiff took five exceptions, which now came on for argument.

Mr. *Lloyd* and Mr. *Jessel*, in support of the exceptions, argued that the defendant's denial, on oath, that the arrangement was continued subsequently to the 7th of February, 1851, did not deprive the plaintiff of his right to a full discovery.

Mr. *R. Palmer* and Mr. *Martindale*, contra, argued first, that there was sufficient in the answer to enable the court to determine the rights of the parties and the extent to which the plaintiff was entitled to an account. Secondly, that the discovery insisted on was vexatious and useless, and that the court had the power and would protect a defendant from being harassed by useless discovery. Thirdly, that the discovery involved a breach of professional confidence, by requiring the defendants to set out an account of the business transacted, and the private affairs of the clients. Fourthly, as to books and papers, they argued that since power had been given to plaintiffs to obtain production of documents in chambers, under the 15 & 16 Vict. c. 86, § 18, and Ord. Can.,[1] exceptions for insufficiency of answers to interrogatories as to books and papers had been discouraged. Law *v.* The London Indisputable Life Policy Company;[2] Perry *v.* Turpin;[3] Barnard *v.* Hunter;[4] De La Rue *v.* Dickinson.[5]

The following cases were also cited: Adams *v.* Fisher;[6] Swinborne *v.* Nelson;[7] Clegg *v.* Edmonson;[8] The Great Luxembourg Railway Company *v.* Magnay.[9]

The Master of the Rolls. I must allow these exceptions. The principle I have usually followed is stated in the cases which have been referred to. I have adopted the rule that a defendant, in order

[1] Page 580.
[2] 10 Hare, App. xx.
[3] Kay, App. xlix.
[4] 1 Jur. N. S. 1065.
[5] 3 Kay & J. 388.
[6] 2 Keen, 754, and 3 Myl. & Cr. 526.
[7] 16 Beav. 416.
[8] 22 Beav. 125.
[9] 23 Beav. 646.

to avoid a full discovery, must protect himself by plea, and that if a defendant answer he must answer fully. I simply refer to the cases, and am glad to be reminded of what was done in them upon appeal, from which I should judge that they were rather confirmed than shaken.

I am very desirous that the suitors should come to the real subject in dispute as early as possible; and where I see that the substantial information is given, though not strictly and technically, I have always discouraged exceptions; but where information is refused, it is the duty of the court to enforce it. Here the discovery is refused as to matters since the 7th of February, 1851, but the books and facts when produced may show that there was an agreement between the parties for continuing the arrangement, or that species of implied agreement which is to be deduced from the conduct and expressions of the parties, and from the manner in which they treated the business transaction. I guard myself, however, from expressing any opinion whether the letter of the 7th of February, 1851, did or did not put an end to the agreement, because the right to a decree and the right to discovery are separate and distinct matters. It being admitted that the insolvency has settled all matters between the parties up to the time when the plaintiff got his discharge, and that certain transactions have taken place since which are not covered by the plea, it is impossible to say that the plaintiff is not entitled to the discovery.

The first objection made is the difficulty of giving the discovery asked, which is searching and minute. But if I find that the defendant has given a substantial answer, I shall not require of him a minute and vexatious discovery. Secondly, it is said that there will be a breach of professional confidence; but if it will be violated by giving a discovery of matters subsequent to the 7th of February, 1851, it is as much violated by the discovery already given up to that time. I think the defendant is bound not to prejudice the interests of his clients, but I think he can give the discovery in such a manner as to avoid that consequence; besides, although he now states that a discovery will be a breach of professional confidence, his answer does not raise that objection.

DRAKE v. SYMES.

BEFORE SIR W. PAGE WOOD, V. C. DECEMBER 5, 1859.

[*Reported in Johnson*, 647.]

THIS case came on upon exceptions to the answer. The bill was filed by a shareholder against the directors of an insurance company which had been carrying on business for twenty-two years. It charged misapplication of the funds, improper declarations of bonuses and dividends, unauthorized investments, and other irregularities.

The 47th interrogatory required the defendants to set out a list of the lives on which all existing policies had been granted, the age of each, the amount, including bonuses, secured by each policy, the amount of annual premium, and the date of each policy, and also an account of all re-insurances, with the amounts re-insured, and the premium payable in each case.

The 59th interrogatory required the defendants to set forth on what particular securities the moneys belonging to the society on the 3d of July, 1855, and each and every part thereof, were invested, or from whom the same were due and owing, and what was the amount invested in mortgages in the United Kingdom and government securities, stating the amount of each particular security.

The 60th interrogatory made similar inquiries with reference to the present state of the investments.

The answer to the 47th interrogatory was as follows: —

"In many instances re-assurances have been effected by the society in respect of policies granted by it and now existing. The books of the society will show what the lives are on which the policies now existing were granted, and the age of each such life, and the amount, including bonuses, secured by each such policy, and the amount of annual premium payable thereon, and the date when each such policy was effected; also what re-insurances have from time to time been effected on such policies, and for what sum, and for what premium each such re-insurance has been effected. We believe that the said books are correct, and we are willing to be bound thereby, and we cannot set forth, as to our belief or otherwise, any information as to the poli-

cies granted by the society or the re-assurances effected by it, except what is contained in the said books. To set forth the particulars required by the 47th interrogatory filed by the plaintiff relative to the said policies and re-assurances would occupy many hundred folios, and under these circumstances we submit that the plaintiff is not entitled to require from us any further answer to the 47th interrogatory."

The answer to the 59th interrogatory stated that the moneys belonging to the society on the day named amounted to £141,000, of which £8384 8*s.* 7*d.* was invested on mortgage securities in the United Kingdom, £20,000 on mortgage securities in the United States, and £112,618 8*s.* 5*d.*, residue thereof, was invested in other securities, consisting principally of loans on personal security made to persons who had effected insurances with the society; and, after explaining some loans which had been particularly referred to in the bill, proceeded thus: "Except as appears from the books of the society, we cannot set forth, as to our belief or otherwise, on what particular securities the moneys belonging to the society and invested on the 3d of July, 1855, or each or any part thereof, was invested, or from whom such moneys or each or any part thereof were due or owing, or what the mortgages in the United Kingdom were upon which so much of these moneys as was invested upon such mortgage securities was invested, or what were the government stocks on which so much of the said moneys as were invested in government stocks of Great Britain was invested, or what was the amount; but we believe that these particulars appear from the books of the society, and that the statements contained in such books relative to the said particulars are correct, and we are willing to be bound thereby; and we submit that we ought not to be required to make any further answer to the 59th of the interrogatories filed by the plaintiffs than such as is herein contained."

A similar answer was given to the 60th interrogatory.

The answer also alleged that it would be injurious to the society and those who had dealings with it to publish the names of the debtors, and claimed to be allowed to seal up such portions of the books as would disclose the names.

The schedule of documents was in the following form: —

10 Ledgers from 1837 to 1859.
7 Journals „ „
8 Cash Books „ „
13 Policy Books „ „
2 Boxes of Securities, Nos. 1 and 2.
9 Minute Books from 1837 to 1859.
Balance Sheets from the year 1842 to the year 1858, both inclusive.
Annual Reports from 1842 to 1858, inclusive.

On a motion in chambers for production, the defendants applied for permission to seal up portions of the books.

This was refused, but the plaintiff was prohibited from publishing the information he might obtain from the books, and immediately afterwards exceptions were filed.

Mr. *Rolt*, Q. C., and Mr. *Cole*, for the exceptions, cited White *v.* Williams.[1]

Mr *James*, Q. C., Sir *H. Cairns*, Q. C., and Mr. *Cotton*, for the defendants.

VICE-CHANCELLOR SIR W. PAGE WOOD. I am of opinion that some more distinct reference to these books is necessary, though I am not disposed at present to say precisely what would suffice. As the answer stands, it is clearly insufficient, and the exceptions must be allowed; but I must reserve the costs,— not with any reference to the merits of the case, but merely on account of the form of the interrogatories. It is extremely difficult for a defendant to know how to answer questions put in such a shape. It is unfortunate that care is not taken so to frame interrogatories as to enable a defendant to put in an answer without an oppressive amount of inconvenience. Here the defendants have been carrying on business for twenty-two years, and they are asked to set out a list of all the lives insured, with their respective ages, the amounts insured, the bonuses awarded, the rates of premium, and the date of each policy. All these particulars, I apprehend, must be contained in the policy-books, and probably in a form which would render it easy to consult them; but it would be desirable to have some reference to the different heads of information.

Then the interrogatory on which the third exception is founded asks a variety of questions as to the investments of the company's property. As to this, there is a good deal of information given in the answer, and there is certainly no appearance of a desire to evade the questions. To require the defendants to set out the names of all their debtors is what the court would no more do than, in a dispute between banking partners, it would require a statement of the balance of every customer of the firm. Still the answer is not sufficiently explicit; but, in consequence of the oppressive form in which the interrogatory is put, I prefer to reserve the costs of this exception also.

The fourth exception refers to the present state of the investments. By the answer the defendants, while submitting to produce their books, claim to be allowed to seal up the parts which show the names of their debtors. This contention was raised in chambers on the motion for production, and an order was made for production of the books, subject only to the restriction that the plaintiff should not be at liberty

[1] 8 Ves. 193.

to publish the information obtained from them. If this had been otherwise decided, and the books could have been sealed up in the manner proposed, the answer, by reference to those books, would have been altogether insufficient, and I should not have hesitated to give the costs of this exception; but it appears that the exceptions were filed immediately after that decision in chambers, and, as the complete books are open to the defendants, I shall reserve these costs.

The rule of practice founded on Lord Eldon's judgment, in White *v.* Williams, I take to be this: when interrogatories are of a character which would make it oppressive to compel the defendant to set out precisely all the particulars called for, the defendant is justified in answering by reference to books, if he says that they contain the best information which he is able to give in answer to the interrogatories. What Lord Eldon says is this: "I cannot permit accounts to be thrown into the Master's office, unless the body of the answer contains an averment that this is the best account the defendants can give. The principle upon which I go is, that the plaintiff has a right, in a suit for an account, to have, by the answer connecting itself with books and accounts referred to as part of the answer, the fullest information the defendants can give him."

The result of these observations appears to me to be that the books ought to be referred to with such explanations and in such a manner as to make it as convenient as possible for the plaintiff to consult them. Therefore it is not enough to say, this large collection of books, including ten ledgers, seven journals, eight cash-books, and thirteen policy-books, contains every thing you want. It is the duty of a defendant to give a specific answer to a specific question. It should have been pointed out in what books information as to the securities was to be found, where the particulars of the policies were to be sought for, and the like, so as to narrow as far as possible the sources of information through which the plaintiff would have to search. While throwing out this general suggestion, I must add that it is the duty of the solicitors on either side, without reference to any irritation which may have existed, to endeavor to give and to accept the information which must be given in the least costly and most convenient form. I do not define precisely in what form the defendants should answer the interrogatories, nor do I say that they are bound to do more than point out the best way in which the information may be got from the books. But the answer does not even do this, and I am obliged to allow the exceptions.

TELFORD v. RUSKIN.

BEFORE SIR R. T. KINDERSLEY, V. C. JUNE 12, 1860.

[*Reported in* 1 *Drewry & Smale*, 148.]

THIS suit was instituted against the surviving partner of the firm of Telford and Ruskin, who were commission wine-merchants, for an account of the partnership transactions. The interrogatories asked an account of the particulars of the assets and liabilities of the firm at the time of the death of the deceased partner, and of the partnership dealings and transactions from December, 1858, till June, 1859, when the deceased partner died.

The defendant made out the account required by the plaintiff and entered it in a book, which he referred to in his answer, but refused to set it out as a schedule to his answer, on the ground that it would expose the names and private affairs of the customers of the firm.

To this answer the plaintiff excepted for insufficiency, and this exception now came on to be heard.

Mr. *Baily* and Mr. *T. Stevens*, for the plaintiff, in support of the exception, submitted, on the authority of Drake *v.* Symes [1] and White *v.* Williams,[2] that the defendant was bound to set out the account in a schedule to his answer.

Mr. *Glasse* and Mr. *Cole*, for the defendant, supported the sufficiency of the defendant's answer.

The VICE-CHANCELLOR. I think this exception must be allowed. This is not a case in which, in order to make out the required account, the books and papers of the firm would have to be consulted and examined for a long period of years, which it would be impossible to do without enormous labor and expense, amounting to oppression. On the contrary, the defendant admits that there is no difficulty in making out the account, and he has made it out in twelve or fifteen pages. But instead of annexing it to his answer by way of schedule, he has entered it in a book, which he says the plaintiff must inspect if he wishes to have the account. This is a course which is not justified by

[1] 8 W. R. 85. [2] 8 Ves. 193.

the practice of the court. The plaintiff is entitled to have the account set out as part of the answer.

But it has been suggested that the setting out a list of debtors to the firm would be a disclosure of the private matters and affairs of those debtors, and might be detrimental to their interests; and reference was made to the case of bankers, and to the mischief that might ensue to their customers if their accounts were disclosed to the public. That objection, however, cannot apply in such a case as the present, where the firm were merely wine commission dealers. If it did, then the executor of any tradesman, when called upon by the residuary legatees to set out an account of the assets and liabilities, might refuse to do so on the same ground. That would be laying down a new rule, for which I know of no authority. The *dictum* of the late Vice-Chancellor, in the case of an insurance company called upon without any purpose or object to set out the names of the persons who had effected assurances with the office, is not in point.

The exception must therefore be allowed.

MANSELL v. FEENEY.

BEFORE SIR WILLIAM PAGE WOOD, V. C. MAY 2 AND 3, 1861.

[*Reported in 2 Johnson & Hemming, 320.*]

THIS was an adjourned summons for production of documents.

The facts and pleadings are stated in 2 Johnson & Hemming, 313 (*ante*, 188), in the report of the case upon the plea.

On the 25th of April, after the judgment overruling the plea, the defendant filed a further affidavit, stating that none of the documents in the second part of the schedule to the former affidavit in any way related to the alleged agreement for a partnership, or to any agreement between defendant and plaintiff, or showed or tended to show that the alleged or any agreement was ever made between defendant and plaintiff, or that the newspaper was purchased or carried on, or so agreed to be, on the joint account of defendant and plaintiff, or that plaintiff then or ever had any right to be a partner or to share in the profits; that the name of the plaintiff was not mentioned in the said documents, except as an ordinary customer, and except at certain specified pages, which particulars defendant was willing to produce, but claimed to seal up the remainder of the account-books, and objected to produce the other documents; and denied that, by the sealed up portions of the book, or by the other documents if produced, the truth of any of the matters contained in the said bill would appear.

Sir *H. Cairns*, Q. C., and Mr. *W. P. Murray*, for the motion. We are not bound to accept the defendant's statement that the documents will not assist us in proving the partnership. This is an inference of law, of which we are entitled to judge for ourselves, and for that purpose to see the documents.

[They cited Smith *v.* Duke of Beaufort;[1] Swinborne *v.* Nelson;[2] Clegg *v.* Edmonson;[3] Great Luxembourg Railway Company *v.* Magnay;[4] Reade *v.* Woodrooffe;[5] Gresley *v.* Mousley.[6]]

[1] 1 Hare, 507. [2] 16 Beav. 416. [3] 22 id. 125.
[4] 28 id. 646. [5] 24 id. 421. [6] 2 K. & J. 288.

Mr. *Rolt*, Q. C., and Mr. *Speed*, for the defendant. We have denied the relevance of all the documents except those parts which we offer to produce. It would be contrary to the practice of the court, and most oppressive, to compel us to disclose the particulars of the profit and loss of the business until the plaintiff has established the alleged partnership. De La Rue *v.* Dickinson;[1] Jacobs *v.* Goodman;[2] Donegal *v.* Stewart;[3] Attorney-General *v.* Thompson;[4] Stainton *v.* Chadwick;[5] Adams *v.* Fisher;[6] Wigram on Discovery.[7]

In Clegg *v.* Edmonson, on the appeal,[8] the Lords Justices ordered the motion to stand over to the hearing; and that would meet the justice of this case.

Sir *H. Cairns*, in reply. Where documents are immaterial to the issue, and material only for inquiries which may take place subsequent to the hearing, I admit that there is no right to production. That was the case with the accounts, the production of which was in dispute in De La Rue *v.* Dickinson. But if the documents are material to the issue, they must be produced. The very fact that the defendant raises additional defences of laches and the Statute of Limitations shows that we have a *prima facie* case, and the documents are *prima facie* relevant. By the answer, the relevance was admitted; and it is not open to the defendant, after his plea has been overruled, to escape production by filing an affidavit, alleging that the documents would not tend to prove the plaintiff's case. In Smith *v.* Duke of Beaufort and other cases, it has been settled that the suggestion in the answer, that the relevant documents will not prove the plaintiff's case, is not alone an answer to a motion for their production.

Vice-Chancellor Sir W. Page Wood. The practice of the court as to production is well settled, and is quite consonant with reason and justice. Even where the question arises on the answer, the court has refused to compel a defendant to set out accounts of profits where the alleged partnership is denied, because a mere account of profits cannot affect the question whether he is a partner or not. The plaintiff is entitled to all such discovery and to the production of all such documents as are necessary to make out his case at the hearing; and if he should fail in that, any account of the profits of the business would become useless and improper; and it would be unjust to the defendant to compel him to disclose such particulars to a person who, in the event supposed, would have had no interest in the discovery.

[1] 3 K. & J. 388.
[2] 3 Bro. C. C. 487, n.; 2 Cox, 282.
[3] 3 Ves. 446.
[4] 3 Hare, 106, 115.
[5] 3 McN. & G. 348.
[6] 3 My. & Cr. 526.
[7] Pages 221, 312.
[8] 3 Jur. N. S. 300.

Even upon the answer, therefore, a defendant cannot be called upon to set out what has no possible bearing on the issue to be tried at the hearing. The same observation applies still more strongly to the production of documents, because the technical rule, that a defendant who answers at all must answer fully, does not touch that case. The real question is, how far the documents in dispute would assist the plaintiff in making out his title at the hearing. It is clear that all documents which manifestly can have no bearing on the issue are protected. On the other hand, the rule is, that a defendant cannot protect himself from production by swearing that the contents of relevant documents are not such as to assist the plaintiff's case. He is bound to put his affidavit in the common form of setting out all the documents which relate to the matters in question in the suit. Here he has admitted that these documents are relevant. From this it would follow, of course, that they should be produced, notwithstanding an allegation that they will not prove the plaintiff's case. The court accepts the defendant's statement on oath as to what documents are relevant; but when this is once admitted, the court does not accept the defendant's assertion on the point whether they will or will not establish the plaintiff's case. Such a statement would be one on which it would be very difficult to obtain a conviction for perjury, however false it might really be. That question, therefore, is considered to be one on which the plaintiff has a right to the opportunity of judging for himself. The production, therefore, cannot be refused; but I can do here, as I have done in other cases, viz., give liberty to seal up portions which cannot possibly bear upon the issue. I intend to protect the defendant against any production which is sought merely from curiosity; but, subject to that, I think the case for production is very strong. There is on the face of the pleadings a *prima facie* case of a joint interest apparent. There is in the affidavit an assertion that the name of the plaintiff does not appear in the documents of which production is resisted, and the contention generally is, that the interest of the plaintiff was merely that of a lender. That, however, is very different from the case which Lord Eldon puts of discovery sought by a person who is a mere stranger; and the utmost I can do now to protect the defendant from needless disclosure will be to order production, with liberty to seal up the money items in the accounts. If any thing special arises upon the face of the documents, that may be the subject of an application in chambers; the principle on which I shall proceed being that all particulars ought to be protected from disclosure, which I can clearly see to have no bearing on the issue.

HOWE v. M'KERNAN.

BEFORE SIR JOHN ROMILLY, M. R. FEBRUARY 10, 1862.

[*Reported in* 30 *Beavan*, 547.]

THE plaintiff, who was residing in America, was the manufacturer of sewing-machines which were sold as "The Howe Sewing-Machines," and by other similar descriptions, to which his name was attached.

In 1860, he employed the defendant as his agent in London to sell these machines.

The plaintiff ceased to employ the defendant on the 1st of September, 1861, and he entered into an arrangement with another person for the sole agency for the sale of the machines in Great Britain.

The bill complained that the defendant afterwards continued to advertise himself "as the agent for the sale of Howe's Sewing-Machines," that he had removed to Cheapside, where he had put these words on the window of his shop, in conspicuous letters: "Luke M'Kernan, Agent for the Howe Sewing-Machine," and that he was offering for sale and selling sewing-machines not manufactured by the plaintiff, under the name of "Howe's Sewing-Machines."

The plaintiff prayed: (1.) An injunction to restrain the defendant from selling sewing-machines under the name of Howe's Sewing-Machines, representing them as machines produced or supplied by the plaintiff. (2.) An injunction to restrain the defendant from representing himself by signs, announcements, or advertisements, as the agent for Howe's Sewing-Machines. (3.) That the plaintiff might pay damages for or account for the profits of his unauthorized acts.

The interrogatories asked the defendant to "set forth and discover the number of sewing-machines sold by him in the shops No. 142 High Holborn, and No. 98 Cheapside, or elsewhere, since the 1st day of September, 1861, distinguishing the place where each such machine was sold, and also the price for which every such machine was sold, by the defendant, and the name and address of the purchaser thereof, and also the price or sum which each such machine cost the defendant, and the profit he made by the sale thereof, and also the name and address of every person from whom the defendant purchased the same machines or any of them, and also the respective dates on

which every such machine was sold or purchased by the defendant, and also in what book or books the defendant had made any entry or entries relating to any such sale or purchase."

The defendant objected by his answer to give this discovery; he said, "I am advised, and I submit to this honorable court, that I am not bound to, and I refuse to set forth or discover the number of sewing-machines sold by me in the said shops," &c. [following the terms of the interrogatories], and "I say that I am unable to answer the said 13th interrogatory or any part thereof without stating to the plaintiff, by this my answer, and informing him thereby of the names and addresses of all my customers for the said machines since the said 1st day of September, 1861, and the prices I have charged them for the said sewing-machines I have sold to them. And I say that such information as aforesaid might, and I believe would, be used by the plaintiff very much to my prejudice. And I further say that, in fact, I cannot answer the said 13th interrogatory nor any part thereof without thereby disclosing the secrets of my trade, and I submit and insist that I am not bound to disclose the said secrets, and I say the plaintiff has no right to know the said secrets or any of them, and that he, in fact, has no interest in them or any of them, and that the said secrets are in fact privileged from discovery."

To this the plaintiff took exceptions, which now came on for argument.

Mr. *Jessel*, in support of the exceptions, relied on the decisions in Swinborne *v.* Nelson;[1] Luxembourg Railway Company *v.* Magnay;[2] Reade *v.* Woodrooffe.[3]

Mr. *Joyce*, for the defendant, argued that the plaintiff was only entitled to a discovery as to the sale of machines sold as "Howe's Machines," in respect of which alone relief was sought, and not of every machine which the defendant had sold unconnected with the plaintiff.

The MASTER OF THE ROLLS. I think the defendant must answer these questions. The point has really been determined over and over again, that, if you want to protect yourself from discovery you must do it by plea, and that if you profess to answer you must answer fully.

It might, in this case, be extremely material for the plaintiff to know the names and addresses of the persons to whom the machines have been sold. Suppose this occurred: if the defendant said, "I sold a machine to A., at Cambridge, but it was not one of Howe's," is not the plaintiff to have the opportunity of seeing that the statement is correct?

I assume that if there was no equity the defendant would have demurred to the bill.

I must allow the exceptions.

[1] 16 Beav. 416. [2] 23 Beav. 646. [3] 24 Beav. 421.

ROBSON *v.* FLIGHT.

BEFORE SIR JOHN ROMILLY, M. R. DECEMBER 8, 1863.

[*Reported in* 33 *Beavan*, 268.]

THE case came before the court on exceptions to the defendant's answer for insufficiency. The case made by the bill was, that the testator devised a house on Ludgate Hill to two trustees, upon trust to pay a moiety of the rent to his son John E. Hall during his life, with remainder to his children, and the other moiety to his daughter Eliza Hall for life, with remainder to her children. And he "directed" that the property "should and might be leased" by his two trustees, "and the survivor of them, and the executors or administrators of such survivor, at rack rent," for any term not exceeding twenty-one years.

The testator died in 1826; one of his trustees disclaimed, and the other died without having acted. In 1848, there being no trustee, the testator's son, who was his heir-at-law, granted a lease to Russell for twenty-one years, at a rent of £180; and in 1850 the defendant Flight purchased this lease for £75.

The infant children of the testator's daughter, who was dead, instituted this suit against Flight, insisting that the lease was invalid under the power. The bill charged that Flight, from 1856 to 1863, when a railway company compulsorily took the property, received the rents, amounting to between £300 and £400 a year. The bill sought to set aside the lease, and to have an account of the rents.

The defendant claimed to be a purchaser for valuable consideration without notice, and he declined to give such part of the discovery required by the interrogatories, as is hereinafter set forth in the exceptions.

The plaintiffs excepted to the answer because the defendant had not set forth (in substance) what had been the amount of rents and profits of the premises during each and every quarter since the assignment, and because defendant had not set forth whether he had not underlet the premises at rents amounting in the aggregate to £419 12*s.*, and the particulars of the rents and of his receipts, and had not stated the portions of the premises which had from time to time remained unoc-

cupied, and why, and during what periods, respectively. That he had not set forth whether he had aliened, mortgaged, charged, or otherwise dealt with the premises, and the particulars.

Mr. *Bagshawe*, in support of the exceptions. The defendant, not having pleaded or demurred, is bound to answer fully. Howe *v.* M'Kernan;[1] Swinborne *v.* Nelson;[2] Clegg *v.* Edmonson.[3] The discovery will be material at the hearing of the cause.

Mr. *Hemming*, contra. The defendant claims to be a purchaser for valuable consideration without notice, and he insists on the validity of the lease. The discovery in question can only be useful if the lease should be set aside at the hearing. The plaintiffs are only entitled to such discovery as will enable them to obtain a decree, and not to a discovery consequential on that relief, which it is oppressive to require, and will be useless if the plaintiffs should fail on their main point.[4] . . .

The proper course will be to allow these exceptions to stand over to the hearing, as was done by the Lords Justices in Clegg *v.* Edmonson,[5] and in Grieves *v.* Nielson.[6]

The Master of the Rolls. I have no doubt that the defendant must answer, and that these exceptions must be allowed. The importance of this information may be very great to the plaintiff, who comes to set aside a lease and to recover the profits made by it. It is true that the knowledge of the amount of profits may not assist the plaintiff in setting aside the lease, but it may be material on the rest of the case. Suppose the defendant states the amount of the profits made by the lease, and that they should appear to be great, the plaintiff might, at the hearing, if the lease were set aside, adopt the statement of the defendant, and take a decree at once for the amount. But suppose he says there have been no profits, the plaintiff might trust to the statement and abandon the suit.

In all these matters it is very difficult to determine before the hearing that the information required will be of no use to the plaintiff; and the rule is strict, that if a defendant answer, he must answer fully.

I express no opinion on the point raised, whether the defendant is or not a purchaser for valuable consideration without notice.

[1] 30 Beav. 547. [2] 16 Beav. 416. [3] 22 Beav. 125.

[4] The learned counsel here cited De La Rue *v.* Dickinson, 3 Kay & John. 388; Mansell *v.* Feeney, 2 John. & Hem. 323; Swabey *v.* Sutton, 1 Hem. & Mill. 514; Lett *v.* Parry, ib. 517. — Ed.

[5] 22 Beav. 125, and 8 Jurist, n. s. 300. [6] Unreported.

KAY v. HARGREAVES.

BEFORE SIR JOHN STUART, V. C. MARCH 12 AND 13, 1866.

[*Reported in* 14 *Law Times Reports, New Series*, 281.]

THIS case came on upon exceptions to the defendant's answer.

The plaintiff was the widow of a Mr. Richard Kay, and the daughter of a Mr. Thomas Hargreaves, who, up to the time of his death in 1822, was a partner in a firm of calico printers, &c. After the death of Thomas Hargreaves, a deed of release, dated the 12th April, 1842, was executed by one James Hargreaves, the defendant John Hargreaves, the plaintiff and her husband, and all the persons interested under the will and in the partnership of Thomas Hargreaves, whereby (*inter alia*) it was arranged that James Hargreaves should receive the sum of £37,000 in respect of his interest in the property.

James Hargreaves died in 1863, and the defendant acted as the administrator of his estate.

The plaintiff was his sister, and one of his next of kin, and she alleged that at the time of the above release her brother's mind was in so weak a state as to render him incapable of understanding the partnership accounts, or the nature of the deed he was called upon to execute.

The bill prayed for a full and complete discovery of all the partnership dealings and accounts from 1822, and for a declaration that the deed of April, 1842, and the accounts, agreement, and other transactions therein recited, ought not to be binding on James Hargreaves, nor upon the plaintiff, as one of his next of kin, and that the amount of James Hargreaves's personal estate, and the plaintiff's share therein, ought to be ascertained.

The defendant in his answer, after stating that all matters in connection with the deed of 1842 had been fully explained to James Hargreaves, and that he perfectly understood them, stated that he, the defendant, could not answer certain interrogatories without making his answer very bulky and incurring great expense. He maintained that both James Hargreaves and the plaintiff were bound by the release of 1842; but that if it should be considered by the court that the plain-

tiff was entitled to reopen the accounts, then he submitted that inquiries could be directed at the hearing, by which the information now sought might be obtained. The defendant further asked to be allowed that benefit from the release, and all other objections to the discovery which he would have been entitled to had the same been raised by him by demurrer or plea.

To this answer the plaintiff excepted.

The *Attorney-General* (Sir R. Palmer), Mr. *Bacon*, Q. C., and Mr. *Little*, for the plaintiff, contended that it was essential to the validity of a release that all the parties releasing should be fully alive to the nature of the deed they were about to execute; but here the weak intellect of James Hargreaves precluded him from a proper appreciation of his own act. The plaintiff wished to establish her own rights, and the fact of the arrangement having been entered into by all the parties interested in the property could not affect her claim to relief. She was entitled to a full discovery, and if she was excluded now from inspecting the books and investigating the accounts, she would be unable at the hearing to bring before the court those facts essential to the establishment of her case. The discovery, instead of causing delay and entailing expense, would have a contrary effect. As to the exceptions to the answer, the question involved was one more of principle than detail. They cited Wedderburne *v.* Wedderburne;[1] De La Rue *v.* Dickinson;[2] Swabey *v.* Sutton;[3] Lett *v.* Parry;[4] Cook *v.* Collingridge;[5] Mazarredo *v.* Maitland;[6] Anon. *v.* Harrison;[7] Rowe *v.* Teed;[8] Freeman *v.* Fairlie;[9] Clegg *v.* Edmonson.[10]

His Honor referred to Macdonald *v.* Richardson.[11]

Mr. *Rolt*, Q. C., Mr. *Malins*, Q. C., and Mr. *E. E. Kay*, for the defendant, were not called upon.

The VICE-CHANCELLOR. There is no doubt about the importance of this question. Generally speaking, the plaintiff is entitled to discovery if it appears material to the relief prayed, and the defendant has submitted to answer; but the question of materiality is one which the court must look at with reference to the constitution of the suit and the character of the proceedings. The present bill has been filed under most extraordinary circumstances. The plaintiff, as one of the next of kin of her brother, seeks to disturb a deed of arrangement executed twenty-four years ago by all of the members of her family. This deed, which was prepared with great deliberation, and in the

[1] 2 Keen, 788, 749.
[2] 1 H. & M. 514; 9 L. T. Rep. N. S. 711.
[3] 8 K. & J. 888.
[4] Ib. 517; 5 L. T. Rep. N. S. 416.
[5] Jac. 607.
[6] 3 Madd. 66.
[7] 4 Madd. 252.
[8] 15 Ves. 372.
[9] 3 Mer. 24.
[10] 22 Beav. 125.
[11] 1 Giff. 81; 10 L. T. Rep. N. S. 166.

planning of which all who executed it had an opportunity of seeking professional advice, was intended to act as a final adjustment of the rights of all parties interested under the will and in the partnership of Thomas Hargreaves. Two of the parties to the deed were the plaintiff and her husband claiming in her right. It does not appear to have entered into the head of the husband, who is now dead, to take exception to the arrangement; but the plaintiff now, not in her individual character, but as next of kin to her brother, whom she alleges to have been of weak understanding, seeks to set aside the deed. It is said that a discovery is necessary in order to arrive at a balance of the accounts, and that the plaintiff is entitled to have all those dealings in the partnership which formed the basis of the deed of release reopened for her inspection. If this were allowed, it would have the effect of disturbing an arrangement entered into by the whole family, and I certainly should not be justified in extending the hard doctrine of discovery to such a case. The exceptions must be overruled with costs.

DIXON v. FRASER.

BEFORE SIR WILLIAM PAGE WOOD, V. C. JUNE 21, 1866.

[*Reported in Law Reports, 2 Equity, 497.*]

EXCEPTION to answer. Bill for specific performance of a contract by defendants to sell an oil mill, with the plant and machinery, to the plaintiff. The memorandum of agreement (dated the 14th of March, 1865) fixed the 13th of May as the time for completion of the purchase, but provided that the purchaser should be at liberty to enter upon the premises for all purposes of use, except alteration and removing of the plant and machinery, immediately after signing the contract; notwithstanding this proviso the plaintiff had been unable to obtain possession, and the contract, from various difficulties that had arisen, still remained uncompleted.

The bill, which was filed for specific performance of the agreement, alleged that the defendants had never furnished the plaintiff with a complete abstract, or made out their title to the premises; and it was alleged, by way of amendment, that the defendants had let the premises to other persons at £40 a month, and that they ought to account to the plaintiff for the rents and profits thereof at that rate, at least from the 14th of March, 1865, and that the plant was daily being deteriorated and worn out by the improper user thereof by the tenants of the defendants.

The amended bill, in addition to relief by specific performance, prayed an account of rents and profits of the premises from the 14th of March, 1865.

The third interrogatory to the amended bill asked whether the defendants had not let the premises to certain persons, and allowed them to use the machinery; and it called upon the defendants to set forth the particulars of such letting, and an account of all moneys received by them, or on their behalf, in respect of the rents, issues, or profits of the said premises, or any part thereof, since the 14th of March, 1865. The interrogatory also asked whether the plant was not daily being deteriorated in value and worn out by the user by the tenants of the defendants.

The defendants answered this interrogatory as follows: "We have

not entered into any other contract or engagement which will have the effect of preventing us from delivering up possession of the premises to the plaintiff, if this honorable court shall decide that he is entitled thereto; and moreover, before we entered into any contract or engagement whatever affecting the premises, the plaintiff had registered this suit as a *lis pendens*, so that no contract which we could enter into could in any manner affect his rights in relation thereto; and we submit that the plaintiff is not entitled to any further answer to the third interrogatory to the amended bill, and we respectfully decline to gratify his curiosity by setting out the particulars inquired after by that interrogatory."

To this answer the plaintiff excepted for insufficiency.

Mr. *Davey*, in support of the exception, contended that the plaintiff was entitled to discovery upon every part of his case that was properly pleaded, and that it was essential for him to know who was in possession of the premises, and on what terms. The bill and answer should form a record upon which a complete decree could be made, and he ought to get from the defendants such an answer as would entitle him (assuming him to establish his right to specific performance and an account of intermediate rents) to take, if he preferred it, an immediate decree for payment of the sum admitted by the answer, without taking the account. Rowe *v.* Teed;[1] Robson *v.* Flight.[2]

Mr. *A. E. Miller*, for the defendants. The interrogatory is a mere fishing interrogatory, and has nothing whatever to do with the question at issue between the parties, which is, whether or not the contract has been rescinded. That is the sole question for trial; and it is an elementary principle that the "right of a plaintiff to discovery is in all cases confined to the questions in the cause which, according to the pleadings and practice of the courts, are about to come on for trial."[3] [The VICE-CHANCELLOR. Assuming that the plaintiff establishes his right to specific performance, the decree will go on to direct an account of intermediate rents.]

That may be, but the information required is on a merely subordinate point, and is unnecessary for the purposes of the hearing; and following Swabey *v.* Sutton[4] and Lett *v.* Parry,[5] even though the plaintiff may show a *prima facie* right to the account of intermediate rents, the court will not compel discovery when the result of the discovery cannot affect the question to be decided at the hearing. In the cases cited on the other side, the plaintiff was in any view of the case entitled to some interest in the property. [He also cited Daw *v.* Eley.[6]]

[1] 15 Ves. 376, 378.
[2] 8 N. R. 188.
[3] Wigram on Discovery, Prop. i.
[4] 1 H. & M. 514.
[5] 1 H. & M. 517.
[6] 2 H. & M. 725.

SIR W. PAGE WOOD, V. C. The exception must be allowed. The allegation of a contract between the parties is not denied; and I must assume, as against the defendants, the possibility of the contract being established. It then becomes a very grave question for the purchaser, who may suffer from any damage resulting from a deterioration of the plant, to know who the persons in possession and using the machinery and plant are, and what is the nature and extent of their interest.

It may be a question whether the plaintiff may not prefer to introduce them as parties to the suit by amendment; and therefore he is entitled to know who they are, the extent and duration of their interests, and generally what sort of claims will be set up against him by them. As to an account of rents, some difficulty, no doubt, arises from a conflict of decisions as to the right to an account of this description, which must require time and trouble, and whether it may not be better that any account of intermediate rents should stand over until the hearing.

There is great force, however, in the observations of Lord Eldon in Rowe *v.* Teed, and of the Master of the Rolls in Robson *v.* Flight. I hold that the simple question, to whom the property has been let and for what term, is one that ought to be answered; and the matter of the rents is really so small that I can make no distinction, but allow the whole of the exception; and, as it seems to be now settled that unless some direction be given the simple allowance does not carry costs, I allow it with costs.

WARRICK v. QUEEN'S COLLEGE, OXFORD.

BEFORE LORD ROMILLY, M. R. FEBRUARY 12, 1867.

[*Reported in Law Reports, 8 Equity, 688.*]

THE bill was filed by four plaintiffs, on behalf of themselves and all other the tenants of the manor of Plumstead, against the lords of the manor, and it alleged that each of the plaintiffs was the owner in fee of freehold hereditaments, holden freely of the lords of the manor; but it did not in any way specify what such hereditaments were. It further alleged that the plaintiffs were entitled to certain rights of pasture, cutting turf, and digging sand and gravel, and other privileges, over certain commons in the manor, as rights appurtenant to their tenements holden of the manor, and that the lords of the manor had in divers ways interfered with the exercise of those rights. It prayed for a declaration that the plaintiffs and other freehold tenants of the manor were entitled to the rights in question as appurtenant to their freehold hereditaments, for an injunction restraining the defendants from interfering with their rights, and for other relief in respect thereof.

The defendants, by their answer, denied that the plaintiffs were freeholders of the manor, and also the existence of the rights in question.

The case now came on upon the plaintiffs' summons to consider the sufficiency of the defendants' affidavit as to documents, and certain objections thereby made to the production of documents in the defendants' possession; and the question mainly discussed was, whether the plaintiffs were entitled to examine the whole of the court rolls of the manor, the defendants insisting that they were entitled to seal up the whole of the rolls, except certain specified passages which showed that the plaintiffs, or some of them, had served on the homage.

Mr. *Joshua Williams*, Q. C., and Mr. *E. R. Turner*, for the plaintiffs. Our object is to establish a custom in the manor. We are therefore entitled to see the whole of the court rolls. [They referred to Rex *v.* Shelley.[1]]

Mr. *Selwyn*, Q. C., and Mr. *Lindley*, for the defendants. We admit, on the authority of Clegg *v.* Edmonson;[2] that the plaintiffs are entitled

[1] 8 T. R. 141. [2] 22 Beav. 125.

to some discovery. The question is, to how much. It cannot be that on a mere fishing bill, the plaintiffs simply alleging a title which is denied by the defendants, the whole of the court rolls are to be produced. Only so much ought to be produced as will enable the plaintiffs to establish that they are freeholders of the manor. Wigram on Discovery.[1] The case of Rex *v.* Shelley was a case of *mandamus* at common law, and there the tenant had established his title as a copyholder of the manor. Here the plaintiff comes into a court of equity, and can only obtain discovery according to the rules of the court. A person claiming to be the creditor of a banker could not insist on seeing all the books of the banker before the debt was established.

Lord Romilly, M.R. I am of opinion that the plaintiffs are entitled to see the court rolls. It is the right of a tenant of a manor to see the court rolls. They are public documents, and belong to him; and if the plaintiffs are not tenants of the manor, the defendants ought to have raised that defence by a plea. The case is not at all analogous to that of a person asking to see the books of a bank, because the proceedings against the bank must be confined to questions of account between a customer and the bank; but this is a question of what the custom of the manor is. If there were a question whether a particular bank, by uniform custom, had bound themselves by a particular mode of dealing with customers, then the mode in which they dealt with other customers would be proper to be disclosed, and would be evidence to be taken in the cause. So here the question is, what is the custom of the manor? and accordingly, for the purpose of deciding that, all the court rolls must be examined. It is impossible to say that the lords of the manor may avoid disclosing the court rolls, or prevent any examination of them, by an assertion that the court rolls do not show the title of the plaintiff, when the title of the plaintiff consists of his being tenant of the manor, and the question is, what, by the custom of the manor, are the rights of tenants of the manor over the waste lands.

[1] Pages 46, 53, 128, 140.

LOCKETT *v.* LOCKETT.

BEFORE SIR C. J. SELWYN AND SIR G. M. GIFFARD, L. JJ. JANUARY 22 AND 23, 1869.

[*Reported in Law Reports, 4 Chancery Appeals, 336.*]

THE plaintiff and defendant in this case had been partners, and dissolved partnership in 1861, when the plaintiff received £10,000 and retired, leaving the defendant in possession of the partnership property, subject to the liabilities, under a written agreement to that effect. The plaintiff, in 1867, filed this bill, stating that the defendant had misrepresented the real state and value of the assets and liabilities, which could only have been discovered by a careful investigation; in particular in respect of a sum of £32,000 due from Messrs. Swayne & Bovill, which the defendant was said to have stated to be of no value, whereas it was a good debt, and had been recovered by the defendant. The bill also alleged that this debt ought to have been excepted from the accounts; and the bill prayed that the agreement of dissolution might be set aside and the accounts taken from 1861, or, if the agreement was not set aside, that the defendant might be ordered to pay to the plaintiff one-half of what he had received on account of Swayne & Bovill's debt.

The plaintiff filed interrogatories, the 29th and 39th being as follows:—

29. "Has not the defendant, in fact, received, and whether or not in respect of the said debt, sums amounting to the sum of £20,000, or some other or what sum? Is he not about to receive, and will he not shortly receive, other and what large, or some and what, sums or sum, either directly or indirectly, on account of the said debt, and whether or not to an extent exceeding altogether the sum of £100,000, or some other and what sum? Is it not the fact that the defendant has already received, or is likely to receive, other and what, or some and what, sums and sum of money from the said Messrs. Swayne & Bovill, or the said G. H. Bovill, and whether or not on account of the said debt? Let the defendant set forth a full, true, and particular account of the particulars of all sums agreed to be paid to the defendant, or which

are expected by the defendant to be paid, or which will be paid to him in respect of the said debt of the said Messrs. Swayne & Bovill."

39. "Let the defendant set forth a full, true, and particular account and all particulars of all the debts and liabilities of the said partnership at the date of the said agreement of the 2d day of November, 1861, and a like account and particulars of all the property, assets, debts, credits, and effects of the partnership, and the value thereof respectively, and of each particular item thereof."

The answer with respect to the debts contained a long account of the defendant's dealings with Messrs. Swayne & Bovill, and of the assignment to him of certain patents of Bovill's for inventions, and of extensions of those patents obtained by him, and of much litigation at his expense connected with those patents, and, in answer to the 29th interrogatory, submitted that the plaintiff had no right to an account of the moneys received on account of these patents, but said: "I admit that I have received, or am entitled to receive, and shall ultimately receive, in respect of my interest in the said invention during the original and extended terms taken together, sums exceeding in the whole the amount of the debt as aforesaid owing at the date of the dissolution of partnership in 1861 from the said Messrs. Swayne & Bovill to the partnership formerly subsisting between the plaintiff and me."

As to the accounts, the answer stated that the books of the partnership had for some years been kept by the plaintiff, and afterwards by a clerk, and the plaintiff had always had access to the books, and could now have access to them; that in pursuance of an order obtained in this suit some of the books had been deposited in court, and that others were in constant use, but might always be seen by the plaintiff; that the accounts extended over very many years, and were of great length; that the defendant had set forth answers to all such of the inquiries as could be answered without setting forth at great length and with unnecessary prolixity accounts of transactions of great magnitude; and the answer contained the following statement: "And I further say that, save by the examination and inspection of the said books, I have no means whatsoever of obtaining or giving any further or other knowledge or information than such as is contained in this my answer with respect to any of the particulars inquired after in any of the interrogatories or parts of interrogatories referred to in this paragraph. And I further say that I am upwards of sixty-eight years of age, and am not a professional accountant, and that I believe it would require long and continuous labor of a professional accountant, and considerable expenditure of time and money, to ascertain from the said books such of the various particulars inquired after in the interrogatories and parts of interrogatories referred to in this paragraph of my answer as can be ascertained

therefrom, and are not in this my answer set forth; and I further say that the agreement for the dissolution, dated the 2d day of November, 1861, referred to in the plaintiff's bill, was entered into for the express purpose, among others, of avoiding and rendering unnecessary the taking of the accounts of the said late partnership; and I humbly submit and insist that it would be oppressive and unreasonable, and could lead to no satisfactory or useful result, to require me to go through the said books myself, and that it would lead to great and useless expense if I were to employ an accountant so to do, inasmuch as I could only state the results which the accountant had arrived at, the accuracy of which results I should not be able to test. And I also humbly submit that I ought not to be required to answer further any of the interrogatories or parts of interrogatories referred to in this paragraph of my answer."

The plaintiff excepted to the answer as to the 29th and 39th interrogatories, and the Vice-Chancellor Malins overruled the exceptions.

The plaintiff appealed.

Mr. *Glasse*, Q. C., and Mr. *Everitt*, in support of the exceptions. The defendant has not answered our interrogatories at all. We say that he represented this debt to us as bad, and we have a right to know what he has received in respect of it. If we succeed in this suit, we shall have a right at once to half this money, and we are therefore entitled to know what it is.

Sir *Roundell Palmer*, Q. C., Mr. *Little*, Q. C., and Mr. *North*, for the defendant.

Mr. *Glasse*, in reply. [White *v.* Barker,[1] Kay *v.* Hargreaves,[2] Adams *v.* Fisher,[3] De La Rue *v.* Dickinson,[4] Mansell *v.* Feeney,[5] Swabey *v.* Sutton,[6] Lett *v.* Parry,[7] Drake *v.* Symes,[8] Telford *v.* Ruskin,[9] were referred to.]

January 23. Sir C. J. Selwyn, L. J. As to the interrogatory respecting the debt from Messrs. Swayne & Bovill, the answer given by the defendant is in substance this: "I have not actually received that debt, but I have entered into certain transactions with the debtors, the particulars of which I relate, by virtue of which I have received large sums of money, which, though not in my view received at all in respect of that debt, exceed the debt due from them." Now, according to the principles laid down by the Lords Justices in Clegg *v.* Edmondson,[10] though not in a formal judgment, and followed by the present Lord

[1] 5 De G. & Sm. 746; 17 Jur. 174.
[2] 14 L. T. N. S. 281.
[3] 8 Myl. & Cr. 526.
[4] 8 K. & J. 888.
[5] 2 J. & H. 818.
[6] 1 H. & M. 514.
[7] 1 H. & M. 517.
[8] John. 647.
[9] 1 Dr. & Sm. 148.
[10] 8 Jur. N. S. 299.

Chancellor when Vice-Chancellor, where, with respect to any particular account, the plaintiff's right to the account is denied, but the defendant gives such an admission as is sufficient for all the objects of the suit up to and including the decree, the defendant need not give any further details respecting the account. Now in this case the object of the plaintiff was to show that by means of misrepresentation and concealment he was induced to enter into an agreement; that one thing concealed was the value of the debts, and that this particular debt was represented to be of little value, whereas it turned out to be of large value. Therefore an admission that the sums received, if they are to be taken as paid in respect of that debt, amount to more than the debt, is an admission that the debt was good, and consequently that admission is sufficient for the purposes of the decree. If, therefore, the matter rested there, the answer would be clearly sufficient. But it was argued further for the plaintiff, and authorities were cited in support of the proposition, that in this case he had a further right, and that, though he might have obtained on the answer sufficient admissions for a decree, he had a right to have such an answer as would save him from the expense of taking an account under the decree. But even if he should obtain relief on the alternative prayer, which is very doubtful, no such final decree could be made at the hearing; for in any case, and if the defendant is treated as a trustee, he would have the rights of a trustee. And if, as he says, he recovered this money by a great expenditure in obtaining an extension of the patent, and defending the patent, this must be allowed to him on taking the accounts. Therefore, both technically and substantially, the answer is sufficient, and the first exception must be overruled with costs.

As to the second exception, what was sought is not, as has been argued, a summary, or balance-sheet, or a statement of the final account. If there were any attempt by the defendant to evade answering such a simple matter, it would have been different; but no such simple question has been asked, or at all events, if asked, it is not included in the exception. The defendant was asked to set forth full, true, and particular accounts of a very extensive business; and in such a case the principle upon which the court has always acted is to consider the circumstances of the case, and see what useful object could be served by compelling such an account; and the more strict the court is in compelling a full answer, the more necessary it is that the court should be vigilant in seeing that the process of the court is not made use of in an oppressive manner. Lord Redesdale[1] says that "In the case of an account required wholly independent of the title, the court has declined laying down any general rule, deciding ordinarily upon the circum-

[1] Page 371, 5th ed.

stances of the particular case. Thus, to a bill stating a partnership, and seeking an account of the transactions of the alleged partnership, the defendant, by his answer, denied the partnership, and declined setting forth the account required, insisting that the plaintiff was only his servant; and the court, conceiving the account sought not to be material to the title, overruled exceptions to the answer for not setting forth the account. And where a plea has been ordered to stand for an answer, with liberty to except to it as an insufficient answer, the court has sometimes limited the power of excepting so as to protect the defendant from setting forth accounts not material to the plaintiff's title where that title has been very doubtful." The Vice-Chancellor, Sir J. Parker, than whom few, if any, higher authorities could be cited with respect to any matter relating to equity pleading, expressed himself to a similar effect in his judgment in White *v.* Barker.[1] It has been attempted to distinguish that case from the present by saying that in the present case the accounts sought for are material for the purpose of establishing the case of misrepresentation alleged by the bill, and consequently that they are the foundation of the title to relief of the plaintiff. But on reference to White *v.* Barker it will be found that there the plaintiff sought a declaration that a particular business was the same business which had been carried on by the intestate during his life, and ought to be considered as having been carried on by the defendants for the benefit of the estate, and the plaintiff asked for the consequential account. It is obvious, therefore, that the accounts there sought were very material for the purpose of showing the circumstances under which the business was carried on, and for the purpose of proving the identity of the business upon which the title of the plaintiff in that case to the declaration sought by the bill was dependent. That case is therefore an authority in point upon the present case; and if the rule is taken to be, as expressed by Lord Redesdale, that in these cases of laborious accounts the court must look at the particular circumstances of each case, or, as expressed by Sir James Parker, that we must inquire what object would be gained by compelling the defendant to do that which he is required at great expense and trouble to do, and if we then look at the circumstances of the present case, we find the circumstances stronger in favor of the defendant than those which existed in White *v.* Barker.[2] The plaintiff says in his bill that nothing but a careful investigation of the books and accounts by a professed accountant would have enabled the plaintiff to discover how the affairs of the partnership itself stood. If we look at the object to be gained by the plaintiff, one can understand that if he had asked any precise and particular questions, as mentioned before, he

[1] 5 De G. & Sm. 746; 17 Jur. 174. [2] Ibid.

might and probably would have obtained something which was material for the purpose of the suit up to and including the decree; but he has either not thought fit to ask any such question, or, if he has asked it, he has admitted that he has obtained a sufficient answer. No useful object could be attained by the plaintiff by obtaining a precise answer to this very particular and minute interrogatory, which requires the defendant to set forth the particulars of all the debts and liabilities of the partnership, and an account of all the property, assets, debts, credits, and effects of the partnership, and the value thereof respectively, and of each particular item thereof. That would, in truth, be nothing more than setting out a long account copied from these books, of which the defendant, in fact, knew no more than the plaintiff, — from books to which the plaintiff himself had access up to the very day of the date of the dissolution of the partnership, and which, for a period some years prior to the dissolution of the partnership, had been kept by the plaintiff himself. No useful object would be answered by a mere setting out the account from those books; and every object would be answered by an inspection of them, which he is at liberty to have at any time. The defendant has done all that was incumbent upon him, when, in answer to an interrogatory framed like this, he has given such statements as are contained in his answer. This exception, like the other, must be overruled; and although, at the present stage of the cause, it is not for the court to speculate upon the probability of the success of the suit, I may say that the nature of the case alleged by this bill, and the character of the interrogatories, is not such as to induce the court to depart from the usual rule of making the costs follow the event. The order of the Vice-Chancellor must be affirmed, and the appeal dismissed with costs.

Sir G. M. Giffard, L. J., said that the 29th interrogatory referred to a debt owing by Swayne & Bovill, and asked the amount received on account of that debt. The answer in respect of this matter said that patents which to some extent formed a security for the debt had been taken by the defendant, and that more had been received upon those securities than the total amount of the debt. But, taking the main part of the case made by the plaintiff's bill, it was quite clear that this debt could only form one item in a very large account; and that at the hearing of the cause, even if he knew the exact amount which had been received, he could not possibly get a decree for any specific sum of money. That being so, his Lordship thought that, with reference to this part of the case, the answer was abundantly sufficient.

Then, coming to the second part of the case, which was this: The plaintiff said, "If I do not succeed on the first point, at all events this debt ought to have been excluded from the agreement altogether, and

is a distinct and separate matter;" but it was quite clear that even if the plaintiff could succeed, very large allowances must be made to the defendant in respect of his expenditure, and therefore, even on the second part of the case, no specific amount could by possibility, even if these questions were specifically answered, be recovered by the plaintiff. But his Lordship went further than that; for on this bill, framed as it was, the utmost that the plaintiff could recover would be one-half of the total amount of the debt which Swayne & Bovill owed, and there were abundant admissions on the face of the answer to give him one-half of the total amount, if at the hearing of this cause he should be held entitled to that relief. Therefore his Lordship was clearly of opinion that the 29th interrogatory was sufficiently answered.

With respect to the second exception, it was material to look at the terms of the question. It was very wide and roving, not dealing with even a balance-sheet, or with results, or with any thing specific at all, but really and in substance asking for that which would naturally be contained in the partnership books; for, if not contained in the partnership books, there would be no record of any thing of the sort. The defendant in his answer referred to the books, and said that they had been produced, that the plaintiff himself kept them up to a given time, that the plaintiff had had full discovery with respect to them, that as to a large part of them they had been deposited with the clerk of records and writs, and there remained deposited, and that as to the rest of them they were in constant use, but the plaintiff could see them. The defendant said that he was willing to be bound by the books, and he said further "that save by the examination and inspection of the said books, I have no means whatsoever of obtaining or giving any further or other knowledge or information than such as is contained in this my answer with respect to any of the particulars inquired after in any of the interrogatories or parts of interrogatories referred to in this paragraph." In his Lordship's opinion that was a sufficient answer, even without depending on the case of White *v.* Barker.[1] His Lordship was satisfied, however, that the decision in that case was very sound, and that in all matters of this sort the court must look at the particular circumstances of each case, and must judge for itself what was, and what was not, reasonable. For these reasons his Lordship thought that the decision in the court below was right, and that this appeal ought to be dismissed with costs; and further, that though the allowance of these exceptions might be a matter of vexation, expense, and trouble to the defendant, his Lordship was satisfied that their allowance would in no way tend to assist the plaintiff in the due prosecution of this suit.

[1] 5 De G. & Sm. 746; 17 Jur. 174.

HERBERT *et al.* v. THE DEAN AND CHAPTER OF WESTMINSTER AND DR. BRODERICK, *et e contra.*

BEFORE LORD PARKER, C. HILARY TERM, 1721.

[*Reported in* 1 *Peere Williams*, 778.]

UPON the plague which happened in the year 1625, the church-yard of St. Margaret's, Westminster, not being large enough to bury the dead parishioners, the inhabitants of that part of the parish which now resorts to the new chapel built there, petitioned the dean and chapter of Westminster (who were lords of the manor) to grant them a waste piece of ground to bury their dead, which accordingly the dean and chapter did under their seals, and it was solemnly consecrated; afterwards these inhabitants were at the charge of building a chapel there, having first obtained a royal license for that purpose. The vestry-men and chapel-wardens had ever since the year 1653 elected the ministers who were to preach there; but now the dean and chapter of Westminster claimed a right to name the minister who should preach and do divine service in this chapel.

On a bill brought to settle the right of nominating the parson of this chapel, and on a motion by the defendants that the plaintiffs might produce the vestry-books before a Master for the defendants if they pleased to take copies, it was objected that the plaintiffs ought not to be ordered to produce their evidence; for that this case was not like that of a lord of a manor producing his court-rolls to the tenant, because the lord, as to the court-rolls, is a trustee for the tenant, whereas one not a tenant cannot oblige the lord to produce his court-rolls; and here the dean and chapter are strangers.

LORD CHANCELLOR.[1] As to the motion that the plaintiffs should produce the vestry-books before a Master, since they in their answer to the cross-bill refer thereto, and by that means make them part of their answer, referring to them (as it is said) for fear of a mistake, for that reason the court ought to let the defendants see them; otherwise there

[1] Only so much of the judgment is given as relates to the motion for production. — ED.

would be no relying upon the answer of those who are thus guarding themselves by references for fear of a mistake, and to avoid exceptions to their answer: wherefore for that the plaintiffs, who were bound to hear their cause in a short time, have the favor and aid of the court by an injunction, and to the intent that the cause may come more fully before the court at the hearing, let them bring the vestry-books before the Master, and the defendants, who are plaintiffs in the cross-cause, if they please, take copies.

EARL OF SUFFOLK *v.* HOWARD.

BEFORE LORD MACCLESFIELD, C. TRINITY TERM, 1723.

[*Reported in* 2 *Peere Williams*, 177.]

THE late Earl of Suffolk and Bindon having no issue, but having two brothers, viz., the present earl, and the defendant Charles Howard, who had a son, and conceiving his next brother, the present earl, to be extravagant, the late earl cut off the entail by a recovery, and by deed and will settled the estate on his brother, the defendant Charles Howard, for life, with remainder to his first son (then in being) for life, with remainder to trustees to preserve the contingent remainders, remainder to the first, &c., son of that first son in tail male, charging the estate only with £100 per annum annuity to his next brother, the present earl, and died without issue.

The present earl brought a bill to discover the defendant's title, setting forth the old entail under which he was heir male, and praying that the writings might be produced, and that the arrears of the annuity might be paid him.

The defendant showed by answer that the late earl had by deed enrolled made a tenant to the *præcipe*, and had suffered a recovery to the use of himself in fee, and afterwards made a settlement as above; that, as to the pretended arrears of the annuity, he had paid the plaintiff, the present earl, more than those arrears came to by about £12, and though he had taken no receipt for them, he intended those payments in part of the annuity.

And on a motion to be paid the arrears of the annuity, and to have all the writings produced before the Master,

LORD CHANCELLOR. This is a hard case; equity, even for younger children, supplies the want of a surrender of a copyhold, and puts them on a level with creditors, taking it to be a debt by nature from a father to provide for all his children, as well the youngest as the eldest.

But is it not a stronger case where the king has bestowed an honor on a family, whereby the heir of the honor is *consiliarius natus*, and sits as a judge in the highest court, the House of Lords? surely it is

incumbent on the ancestor to leave some provision for the maintenance of the honor, and looks like want of gratitude to the crown (from whence this honor did arise) to leave it naked, especially where the ancestor had a great estate in his power, and has given it from the earldom, leaving such a trifle as only £100 a year to the present earl.

Therefore more ought to be done in this case for the plaintiff than in a common case. Here is no purchaser, and there seems no necessity to bring the cause to a hearing, for that would be only putting both sides to great charges, which would be still harder on the earl, as he is so little able to bear it.

Let the defendant bring before the Master all deeds and writings, and let the plaintiff, the present earl, either by himself or agents, have the inspection of them, that if any thing has slipped the conveyance, or if the entail be not well docked, he may have the benefit thereof.

And the answer not being positive, as to the payment of the arrears of the annuity, or that the payments which were made to the plaintiff were in part of the annuity (it being only said that the defendant intended them so, which intention none could know, since he did not then declare it), and because the defendant has not taken or insisted upon any receipts from the present earl, and the late earl has been dead two years, let the defendant pay the plaintiff £200, being two years' arrears of the annuity, subject to the order of the court.

SIR EDWARD BETTISON *v.* ALBINIA FARRINGDON AND HER TWO SISTERS.

BEFORE LORD TALBOT, C. TRINITY TERM, 1735.

[*Reported in* 3 *Peere Williams* (*Cox's ed.*), 868.]

SIR EDWARD BETTISON, deceased, was tenant in tail of a considerable estate in Kent, remainder in tail to the plaintiff's father, remainder to Sir Edward Bettison, deceased, in fee. Sir Edward Bettison did by lease and release make a tenant to the *præcipe*, and suffer a common recovery, declaring the uses to himself and his heirs, after which, on his dying intestate and without issue, the defendants, his three sisters, entered on the premises; and now, on the death of the plaintiff's father, the present Sir Edward Bettison brought a bill to discover what title the defendants had, who by their answer showed that their brother, the late Sir Edward Bettison, did execute the said lease and release, and also suffered this recovery to the use of himself in fee, referring to the deeds in their custody.

The plaintiff, on motion without notice, obtained an order from the Master of the Rolls that the defendants should produce, and leave with their clerk in court, the lease and release. Upon which I moved the Lord Chancellor to discharge such order, for that, as the defendants were sisters and heirs-at-law to Sir Edward Bettison lately deceased, and also heirs to Sir Edward Bettison, the first ancestor, and claimed under a common assurance, the court would not assist the plaintiff in picking holes in their title, nor compel them, at least not before the hearing, to produce their deeds; that both parties were volunteers, in which case it was not usual for the court to interpose or give the least assistance to either.

LORD CHANCELLOR. Though both parties are volunteers, yet it is of some weight that the honor of the family is descended on the plaintiff; and as at the hearing you admit the court would do what has been desired, so it is for the benefit of all parties that it should be done before the hearing; for if the deed be a proper one to make a tenant to the

præcipe, the plaintiff will go no further, which will put an end to the suit. And the defendants, by referring to the deeds in their answer, have made them [1] part thereof. Wherefore I think the order that has been made at the Rolls a reasonable one, and will not set it aside.

[1] *Quære.* Whether the bare referring to a deed, without setting it forth *in hæc verba*, will make it part of the answer? and see 3 P. Wms. 85, the case of Hodson *v.* The Earl of Warrington

EARL OF SALISBURY v. CECIL.

BEFORE LORD THURLOW, C. NOVEMBER 16, 1786

[*Reported in* 1 *Cox*, 277.]

THIS bill was filed (amongst other things) for an account from one Wilkinson, who was chief auditor and steward of the late Earl of Salisbury, of all sums of money received by him on account of the said late earl, and that he might account for the profits made by him of the said earl's money, which, as was charged by the bill, was from time to time laid out by him in the funds and other securities at interest. Wilkinson, by his answer, admitted that his agents from time to time remitted very large sums of money belonging to the said earl to his (Wilkinson's) bankers, but said that the same was mixed with his own money, by which means he was unable to set forth what profits had been made of the said earl's money. Wilkinson afterwards died before the hearing of the cause, which was revived against his representatives. And it was now moved that the defendants, the representatives of Wilkinson, "might produce at the hearing of the cause all books kept by Wilkinson at his bankers' during the time he was chief auditor and steward of the said late earl;" which motion was made with a view of showing from the bankers' books that Wilkinson did from time to time draw out the earl's money for the purpose suggested by the bill.

LORD CHANCELLOR. From the circumstance of Wilkinson having mixed the money of the late Lord Salisbury with his own, which fact is admitted by his answer, I am of opinion that these books ought to be produced, and such parts selected at the hearing as shall appear to apply to the subject before us. The objection made is, that the books are improper to be produced on other accounts; but a man shall never be at liberty so to fence with justice as to shelter himself under a circumstance arising from his own improper behavior in mixing the money with his own. And his Lordship made the order as prayed.

SMITH v. DUKE OF NORTHUMBERLAND.

IN THE EXCHEQUER. JUNE 12, 1787.

[*Reported in* 1 *Cox*, 368.]

THE bill in this cause stated the plaintiff to be rector of the parish of Ilderton, in the county of Northumberland, and as such entitled to certain parcels of glebe lands, and also to a right of pasturage on the waste lands of the township of Ilderton, in common with the owners or proprietors of the rest of the lands in the said township; that such parcels of glebe lands and rights of pasturage were from time to time for a great number of years let by the rector of the said parish for the time being to the tenants of the owner or proprietor of the rest of the lands within the said township; that in the year 1710, and from time to time since, the said glebe and right of pasturage had been so letten for a rent of £13 per annum to the ancestor of the defendant Thomas Ibbetson, who was owner of all the other lands in the township, and that receipts had been from time to time given by the rectors to them for the rent; that the defendant Thomas Ibbetson had inclosed great part of the arable lands in the said township which were before uninclosed, and had therein included great part of the said glebe lands, and had totally destroyed the boundaries of the said glebe lands and confounded them with his own lands. The bill then charged (amongst other things) that the said defendant had in his custody or power some ancient map or plan of the said township which distinguished the said glebe lands and the boundaries and abuttals thereof, and also the boundaries and abuttals of the lands belonging to the defendant in his own right, and prayed that the glebe lands might be ascertained and set out, &c.

The defendant, by his answer, admitted that he had in his custody or power several receipts given by the former rector to the defendant's father, and to him, the said defendant, for the rent of the said glebe, and said he was ready and willing to produce all such receipts for the inspection of the plaintiff, in case the court should think fit to direct him so to do. He also admitted that he had in his custody an ancient plan or survey of the township of Ilderton, purporting to be made in

the year 1728, which was in the lifetime of the defendant's grandfather, and said that the said plan or survey appeared to have been drawn with the greatest care and accuracy, and that there did not appear to be the least notice taken or any mention made of any glebe lands or any lands belonging to the church. The defendant then stated by his answer that if ever there were any glebe lands specifically set off and enjoyed in the township of Ilderton by the rector of the said parish, he believed that the said lands had been legally and effectually conveyed to his, the said defendant's, ancestors, or to those whose estate they had or enjoyed, and under whom he, the said defendant, claimed, and that the annual sum of 12*d.* [*sic*] was duly reserved and made payable and issuing from and out of such glebe lands, and some other lands within the township of Ilderton aforesaid, to the incumbent for the time being of the said church in lieu thereof, and that such yearly sum had been constantly paid to the said incumbent accordingly by the owners of the lands within the said township of Ilderton.

It was now moved on the part of the plaintiff that the defendant Thomas Ibbetson might produce all the receipts from the rectors to the owner of the land acknowledged by the defendant to be in his custody, and also the ancient map and survey of the township, and leave them for the inspection of the plaintiff.

In support of the motion it was said that the documents now asked for were not muniments of the defendant's title, for it was admitted that the defendant was in possession of the lands which either belonged to the plaintiff, or out of which a rent was issuing to the plaintiff, and the only doubt was on the boundaries of these lands which had been confounded by the act of the defendant; that under these circumstances there was a privity between the plaintiff and defendant which gave the plaintiff an interest sufficient to entitle him to what he now asks, and this is not within the rule of these cases where a plaintiff calls for the evidence of the defendant's title, without having first established an interest in the matters in question. That the case of Wilkinson *v.* Allott, 7 Bro. P. C. 518, was an authority for compelling a production of the map required, and indeed that case turned almost entirely upon the evidence of a similar map; that according to the reason in Radcliffe *v.* Fursman, 3 Bro. P. C. 538, a plaintiff was entitled to a discovery of all the defendant had said, *done*, or *written* concerning the matter in question, and the Court of Chancery, and afterwards the House of Lords, compelled the defendant in that case to produce a case laid by him before counsel, though they allowed his demurrer as to the opinion given by the counsel in answer.

The Lord Chief Baron[1] said that however cautious the court will

[1] Eyre. — Ed.

be in making orders for general production of instruments, yet the moment a plaintiff has established an interest in any instrument, he has certainly a right to have a production of it; at the same time, it would be very dangerous to order a production upon all occasions on confession of instruments being in a defendant's hands; that, however, upon the present case, his Lordship thought the receipts and the map ought to be produced; the defendant by his answer admits the tenure, but it seems that the boundaries are destroyed. Now the tenant is bound to preserve the boundaries; if a rent be issuing out of land, and the boundaries are lost, the tenant is obliged to discover them; a privity therefore is established between the plaintiff and defendant. The articles called for by the plaintiff are: 1st. The receipts. Now where no actual deed exists, receipts are the only evidence of tenure; and they are evidence on each side, — for the plaintiff, operating as an acknowledgment of the payment of the money on the part of the defendant by accepting the receipts; and for the defendant, as a discharge for such payment; and they seem exactly in the situation of leases and counterparts. 2dly. The map specified in the answer. Now with respect to the map, that stands on a different footing; it is a map of the whole township; it is admitted the defendant has the glebe, but the doubt is, whether he holds it as tenant at will, or absolutely, subject only to pay a composition out of it by way of perpetual rent. In these circumstances he is bound to give the best account of the matter he can. This map is not a private muniment of the defendant's title against others, but merely a description of lands within the township, and it may certainly throw great light upon the subject; at the same time, there can be no danger of any discovery of title. The situation of the parties is admitted to be such as shows the defendant to be bound in conscience to give the plaintiff the best account he can. His Lordship was of opinion, therefore, that the receipts and map ought to be produced. The other Barons concurred.

CAMPBELL v. FRENCH.

IN THE EXCHEQUER. JUNE 22, 1792.

[*Reported in* 2 *Cox*, 286.]

THIS was a bill of discovery for the purpose of procuring evidence to defend an action at law.

The plaintiff had as surety indorsed three sets of bills of exchange drawn upon the East Indies. The defendants French and Hobson were the agents in England who had negotiated the bills for the defendants Boutillier at Nantes.

The bill stated a great variety of instances of laches in Boutillier and his agents in India and also in England, which, if discovered, would have discharged Campbell the indorser; and the bill further required a discovery of the correspondence between the parties, and of the letters in their hands.

The defendants set forth, by way of schedule to their answers, lists of all letters and papers in their possession, custody, or power; and also extracts from the correspondence, the reference to the schedules being in the following words: "that in the first schedule to their answer they have set forth, to the best of their knowledge, &c., a list and description of all such letters received by them, or either of them, from any person or persons whatsoever, or written or sent by them, or either of them, to any person or persons whatsoever, which are in their or either of their possession, custody, or power. Say that they have in the second schedule to their answer annexed set forth, according to, &c., in the words and figures thereof, all such parts of such letters or copies which in any wise relate to any of the said matters in the said bill of complaint stated or charged respecting the said bills of exchange, or any of them, or relating to any of the matters in question in this cause; but the defendants say many of the said letters, both written and received by them, relate also to other matters not in question in this cause, which the defendants apprehend and submit they ought not to be compelled to disclose; and therefore the defendants hope they shall not be compelled to leave the same in the hands of their clerk in court."

Upon the day of showing cause why an injunction, which had been obtained for want of an answer, should not be dissolved, the plaintiff moved that the defendants might leave in the hands of their clerk in court all the letters mentioned in the first schedule to their respective answers, and that the injunction should be continued until the production should be made, and the plaintiff might have liberty to examine them, and that the clerk in court might attend with them at the trial of the action.

Upon this motion it was urged that this was an application often made, and always granted; that if a defendant was at liberty to select such parts of letters as he thought fit, and to protect himself from producing the rest by alleging that they related to other matters, it would be easy to avoid all material discovery; that where, as in this case, the plaintiff showed an interest in the letters, and therefore a title to have them produced, the defendant, in order to avoid it, should at least state some particular inconvenience to arise to him from making the production, which they had not done here.

On the other hand, it was said that the defendants were great merchants; that their correspondence must necessarily relate to other matters, and was sworn by their answers so to do; and that it would be attended with the most serious general inconvenience if the correspondence of merchants were to be exposed in this manner to every person who might have a right to a discovery as to a single point; that in this case they had sworn that they had discovered all such parts of the correspondence as related to the matters in question in the cause; that it was difficult to distinguish this case in principle from one which had often occurred in this court, viz., where parties are directed to produce books of account, in which case they are permitted to seal up and to conceal all the other parts of the books relating to other accounts; and that when the order has been made for a general production, it proceeded commonly upon the submission of the defendant so to do.

For these reasons the court refused the application and dissolved the injunction, the defendants consenting that the plaintiff might upon the trial read from the schedules any of the letters they should think fit, without referring to the answers, or making them evidence.

GARDINER v. MASON.

BEFORE LORD LOUGHBOROUGH, C. DECEMBER 13, 1793.

[*Reported in 4 Brown's Chancery Cases (Belt's ed.), 479.*]

MR. ATTORNEY-GENERAL [1] moved, on the behalf of the plaintiff, that the defendant might leave in the hands of his clerk in court, for the perusal of plaintiff's solicitor, the several letters and copies of letters, stated in the defendant's answer to have been found among his late father's papers, respecting the purchase of the estate mentioned in the pleadings in the cause, particularly the copy of a letter written by his said late father to Messrs. Symson and Robertson, and other letters and papers, and might produce the same at the hearing of the cause.

Mr. *Leach* opposed this motion; he said the rule was, that the defendant was compellable to produce papers admitted by the answer to be in his custody; but the papers, to fall within the rule, must be essential, and tend to support the plaintiff's bill; not as the papers here do, tend to defeat his title. It extended also only to papers that were specified. Here the reference was general, to letters and copies of letters. The cross-bill was founded on these papers, and to disclose them would put the plaintiff in possession of the defendant's defence. In Davers *v.* Davers, 2 P. Wms. 409,[2] a similar order was refused. He might say in this case, as Mr. Lutwyche did in that, "the other side can

[1] Sir John Scott. — ED.

[2] Before Lord King, C., Easter Term, 1727. "In the proofs of this cause the plaintiff had proved a certain deed, and the defendant, on petition to the Master of the Rolls [Sir Joseph Jekyll], got an order for leave to inspect the deed, because (as was said by Mr. Solicitor-General [Sir Charles Talbot], in support of the order) the deposition of the witness referring to the deed made the same part of the deposition.

"Mr. Lutwyche moved to discharge this order, for that the other side can have no right to see the strength of my cause, or the evidence of my title, before the hearing; and if this were to be granted, such motions would be made every day, since it would be every one's curiosity to try to pick holes in the deed or settlement by which he is disinherited, and no such order in the like case was ever yet made.

"Which Lord Chancellor thought very reasonable, and therefore discharged the order." — ED.

have no right to see the strength of my cause, or the evidence of my title, before the hearing." Hodson v. Warrington, 3 P. Wms. 34.[1]

Lord Chancellor said, if the defendant relied on a paper, that made it material; and made the order as to the only letter specifically referred to in the answer.[2]

[1] Before Lord King, C., Hilary Vacation, 1729. "At the hearing of this cause it appeared that the defendant had examined a witness to prove a deed executed by him to his brother, to whom he was administrator, and claimed to be a creditor by judgment, which judgment was said to be discharged by the deed so proved in the cause, the said deed being alleged to amount to a release; in consequence whereof there would be assets to pay the debt due from the intestate to the plaintiffs. And now the question was, whether the plaintiff could compel the defendant to produce this deed?

"It was urged for the plaintiff that he might; for the defendant having proved it, and the witness having referred thereto by his deposition, the same was now become part of the deposition itself, and in the possession of the court; and as the plaintiff could read any part of the deposition taken for the defendant, by the same reason he might insist on having the deed produced; and that the Master of the Rolls [Sir Joseph Jekyll] had made many orders to the like purpose.

"To which it was answered, it was true the Master of the Rolls had made many such orders, but then it was as true, that whenever these came before the Lord Chancellor, they were as constantly set aside; that a deed was not part of the deposition unless mentioned therein in *hæc verba*; and that, as to the deed the defendant had proved, it remained at his election whether he would make use of it or not; that accordingly it was so ruled in the case of Calmady v. Calmady, where the court would not oblige the defendant to produce a deed which he had proved.

"The Lord Chancellor held this to be the course of the court, and therefore would make no order for the defendant's producing the deed." — Ed.

[2] The order was in fact made according to the terms of the motion, and specified various letters and papers admitted in the answer. — R. L.

LADY SHAFTESBURY *v.* ARROWSMITH.

BEFORE LORD LOUGHBOROUGH, C. JULY 24, 1798.

[*Reported in* 4 *Vesey*, 66.]

SIR JOHN WEBB, by his will, gave all his estates to Arrowsmith and Butler in trust.

After a suit had been instituted for the purpose of establishing the will, this bill was filed against the trustees, stating that the plaintiff is heir-at-law and customary heir of the testator. The bill also stated that the plaintiff is heir of the body of the testator, and that she is totally ignorant whether she is or is not entitled to any and which of the estates devised; that the estates are in the possession of the defendants; that there were several settlements; and that it is impossible for the heir to know her title without an inspection of the deeds. The bill therefore prayed that the defendants may be decreed to produce and show to the plaintiff all the several title-deeds and writings which shall appear to be in their possession; and, if it shall appear that the testator was not seised in fee, or if any of the estates were copyhold, not duly surrendered to the use of the will, or if the will was not duly executed, or if it shall not appear that the testator was of sound mind at the time of execution, or if any fraud was practised, then that the several title-deeds, settlements, and instruments in writing relating to such of the said estates as the plaintiff shall appear entitled to, either as heir-at-law, customary heir, or heir of the body, may be decreed to be delivered up to the plaintiff.

The defendants, by way of schedule to their answer, set forth an abstract of several settlements in their possession.

A motion was made on the part of the plaintiff for an order that the deeds might be produced for her inspection; and that they might be deposited in the Master's office.

Mr. *Mansfield*, Mr. *Sutton*, and Mr. *Cox*, for the motion. In Bettison *v.* Farringdon, 3 P. Wms. 363, the party was not heir, except as to an honor descending upon him; and it was admitted there that it would be done at the hearing. So in the Earl of Suffolk *v.* Howard, 2 P. Wms. 176, which was a bill on the part of the heir, it is plainly

implied that the question was not whether there was to be a production of the deeds, but whether it could be done upon motion, or was to wait for the decree. The heir, without an inspection, cannot tell what is the title of the ancestor, whether in fee or in tail. He must assume the title of the ancestor to be a seisin in fee. I believe Lord Hardwicke considered the rule established that the heir has a right, upon filing a bill against the devisee, to have the title-deeds produced; and Lord Mansfield frequently spoke of this right in the heir. Burton *v.* Neville,[1] before Lord Thurlow, is directly against the cases I have mentioned; in the last of which, not only an inspection of the deeds creating an entail, or making a tenant to the *præcipe*, was granted, but of all deeds and writings. The claim as heir in tail is exactly according to the cases in Peere Williams. Lord Thurlow thought the heir entitled to the deeds creating the entail and the prior title-deeds.

In this case six or seven family settlements of these estates have been made from time to time. They are stated in the abstract; but the plaintiff has not seen the particulars of them, nor the deeds making tenants to the *præcipe*. She has a right to all those. The court always indulges the heir with an opportunity of knowing how he is disinherited. The heir is always under this difficulty, that, not having the possession of the deeds, he cannot point out those under which he has an interest. Is there any other mode of ascertaining that than by the production of all? If it is once ascertained that the devisor was seised in fee, certainly the heir can only ask whether the will is effectual; but in this case a title in tail is asserted.

Attorney-General,[2] *Solicitor-General*,[3] and Mr. *Thomson*, for the defendants. This application involves a proposition of great consequence; so much so, that perhaps the court would hesitate to grant it on motion. The bill is very peculiar; for first it considers the plaintiff as heir-at-law, then states a possibility that she may be heir in tail; and in that mixed character she calls for the relief to which she may be entitled, if she is proved heir in tail; but she does not assert

[1] 2 Cox, 242. June 2, 1790. "Plaintiff claimed under a settlement; defendant under recoveries, &c. In his answer the defendant admitted that he had the deeds in his possession, but did not submit to produce them.

"*Mitford* had before moved to have them produced under authority of the case of Bettison *v.* Farringdon, 3 P. Wms. 363. *Campbell* observed that for any thing that appeared in that case, the defendant might have submitted to have produced them; and the motion was refused. This day *Mitford* moved it again, with the additional authority of the case of Earl of Suffolk *v.* Howard, 2 P. Wms. 177.

"The Lord Chancellor [Thurlow] again refused it, saying that he thought the principle was that plaintiffs could only call for those papers in which they had shown that they had a common interest with defendant, and courts had never gone beyond that." — Ed.

[2] Sir John Scott. — Ed.

[3] Sir John Mitford. — Ed.

that positively, or pray a discovery as to that. As heir-at-law she might bring an ejectment; and if there was any difficulty in her way, she would be entitled to remove it, and to have a discovery. The bill, therefore, is not properly framed in that character. As heir in tail she states no entail. She might say, as they have got the title-deeds, she has a right to discover whether or not there was an entail under which she could claim; they might answer that they could not find it, or they might refer to it so as to entitle her to the production; but the bill is not framed with that view. It is only a loose allegation that she does not know but that she may be entitled in tail. It is necessary to have a degree of certainty in the bill, that the defendants may know what defence to make. Suppose an entail was stated, the defendants might plead the deeds of the recovery; but if the entail is not distinctly stated, they are ousted of that defence. The plaintiff merely states, in general terms, that she is heir-at-law; and also that she is heir in tail, without setting forth any deed or referring to any specific act to establish that title. As the heir is a female, it might happen that if she could show an entail, it might not give her a title, but, without giving any interest to her, it might operate directly against the devisees of her ancestor. In the cases cited a special deed of entail is stated. In Dormer *v.* Fortescue, 2 Atk. 282, 3 Atk. 124, and Pincke *v.* Thornycroft, before your Lordship, Lord Thurlow, and the House of Lords,[1] the title was as heir general; and it was held, that though the heir has an equity beyond any one else, yet he must admit that the possession of his ancestor is *prima facie* evidence of seisin in fee; and he must frame his bill so as to satisfy the court that if he brings an ejectment upon that sort of evidence, that his ancestor was seised in fee, he may meet with some impediment in the application of that evidence at law, which in equity he has a right to remove, in order to try it at law. It was pretended in that case that a mortgage term would be set up against the ejectment.

The heir in tail is in a different situation. He has a right to inspect and be enabled to produce the deed creating the entail; but then the moment he proves himself heir of the body of the person last seised, he puts it upon the other party to meet him at law upon that title. The heir in tail has no other right than to see the deed creating the entail and the prior deeds, but not to call for the deeds by which that entail is defeated; which is the point to be tried at law. That was the principle of Burton *v.* Neville. In Bettison *v.* Farringdon it was an order of course to set forth the deeds referred to in the answer. In the other case in Peere Williams the party could not make *profert* of the deed in a court of law; and he had a right to have that deed pro-

[1] 1 Bro. C. C. 289; Cruise, 174.

duced by the decree of a court of equity. The court said, that as the other party informed the court how the entail had been barred, he must show the deed, that the court may determine whether it has the consequence they attribute to it; but they might have refused to produce any except the deed of entail and the prior deeds. In a late case in the Court of Exchequer the bill was filed by an heir in tail, praying a discovery of all the deeds. A demurrer was put in to so much of the bill as related to any deeds subsequent to the deed creating the estate tail; and the demurrer was allowed. Stapleton *v.* Sherrard and Sherbone *v.* Clerk, 1 Vern. 212, 273, perfectly warrant that decision. A person desiring the production of deeds must show a title to that production. For that purpose he must show some claim under the deed, unless the object is to set aside the deed as fraudulent, the claim being paramount the deed. Such a general right in the heir would be very mischievous. There is no case in which a loose bill like this has had that effect. If there are circumstances, if a term or a mortgage is stated to be in the way, he has a right to a discovery as to that, but to that only. The defendant must state by his answer whether there are such incumbrances or not. The deed of entail is distinctly stated in the two cases in Peere Williams. In one, there is a *quære* by the reporter, whether a bare reference to a deed will make it part of the answer. In the other, the court appears to have gone rather too far, upon the ground that it was a hard case, and on account of the complete disinherison of the earl, who had not the means of pursuing the suit. It is not noticed in later cases as having been urged; and it ought not to be much cited.

Reply. The plaintiff says she is heir in tail; and if any entails were created, which are not barred, she is entitled under them. What more can she say, when all the deeds are in the hands of the defendants, which is admitted? What more can she state than that she is ignorant whether the devisor was entitled in fee, and had power to dispose? The answer refers to a great many deeds, without stating the contents; but apparently there are many settlements creating entails. It is admitted that the plaintiff has a right to the inspection of deeds creating entails; as to any thing else, Burton *v.* Neville is an authority against it; but it stands in opposition to the cases in Peere Williams. It is true, in both those cases an entail is stated; but the order appears to go far beyond the production of those deeds, and goes clearly to the deed creating the tenant to the *præcipe;* and the rest only refers to the time when the production is to take place.

Lord Chancellor. It would be a very delicate point to order a general inspection into all deeds and settlements on behalf of a person claiming in the mere character of heir-at-law. I do not find any spark

of equity upon which that application could be made to this court and supported. The title of the heir is a plain one; and it is a legal title. All the family deeds together would not make his title better or worse. If he cannot set aside the will, he has nothing to do with the deeds. He must make out his title at law, unless there are incumbrances standing in the way which this court would remove in order to his asserting his legal right. There the principle of equity interferes. The cases in Peere Williams are those of an heir in tail. A will is no answer to an heir in tail; a will established is an answer to an heir-at-law. An heir in tail has beyond the general right such an interest in the deed creating the entail, that the court, as against the person holding back that deed, would compel the production of it. His right also is upon a very plain ground, — to remove an impediment preventing the trial of a legal right. In the two particular cases cited (I do not go quite along with the reasoning in either of them), the court did no more than what according to the state of the case was perfectly innocent, and led to no mischievous consequence; for the production of the deed creating the entail, where the party could not get at it without the aid of this court, I have already stated it is in the power of the court to order; as to what more was done, he being tenant in tail, and that admitted, the court, by enabling him to look at the deed to make the tenant to the *præcipe*, only put him in the situation he would be in at law upon an ejectment. Where the tenant in tail has possession of the deed that makes the entail, and can prove the heirship in tail, it is put to them to produce the recovery. All the proceedings of necessity appear upon the trial, and must be brought forth. They cannot set out the judgment in the recovery, but must set out the whole proceedings. I remember a very long title upon a special verdict. The consequence was, that it was enormously swelled by setting out one or two recoveries. A proposition was made to the court, whether it would not be better to state the fact that the recovery was suffered; but upon consideration the court thought it quite necessary to show upon the record that it was well suffered. The court, therefore, in those cases gave him no discovery that in the course of his legal pursuit he would not come at; and the only advantage was to give him a little time to consider whether it would be worth his while to go on to prosecute his right at law. I rather imagine (it is a bold conjecture upon Peere Williams's Report) that "at the hearing" means at the trial. There is no hearing upon a mere bill of discovery. Permitting a general sweeping survey into all the deeds of the family would be attended with very great danger and mischief; and where the person claims as heir of the body, it has been very properly stated that it may show a title in another person if the en-

tail is not well barred. It may set up a title not to the benefit of Lady Shaftesbury, but to the injury of the devisees, indulging a speculation to the prejudice of parties whose interest this court has no right to invade.

I apprehend they have no objection that all the deeds purporting to be deeds of settlement creating entails shall be produced for inspection, otherwise it must go on to pointing interrogatories and asking for an answer. The defendant Arrowsmith must give himself the trouble of inspecting the deeds, and answering upon oath whether they create an entail or not. Wherever you find a deed of entail it would be very idle not to produce it, and also the deed which destroys the entail; it would be no breach of duty in the trustees to give that qualified communication of the deeds, but rather the contrary. The plaintiff has a right to an answer to this question: Are there any deeds that contain a limitation in tail general?

As to the other part of the motion, it would be very proper to make an order for the deposit of the deeds in the other cause.

The order pronounced was, that the defendants shall give inspection of all deeds of settlement set out in the schedule creating estates in tail general.

ASTON v. LORD EXETER.

BEFORE LORD ELDON, C. JULY 11 AND 13, 1801.

[*Reported in* 6 *Vesey*, 288.]

MR. BENYON, for the plaintiff, moved that the defendant may be ordered to produce, and leave with his clerk in court, several deeds dated in 1690, 1701, and 1702, set forth in the answers, and all other deeds relating to the premises, in aid of an ejectment brought, and that copies may be produced at the trial, if the originals should not be produced. The bill prayed a discovery and a commission to ascertain boundaries.

The LORD CHANCELLOR expressing doubt upon this motion,

Mr. *Bell* (*amicus curiæ*) mentioned Worsley *v.* Watson, in which the bill stated a settlement and proceedings at law, and desired a discovery of that deed. The answer denied the pedigree, but admitted they had the settlement. A motion was made that they should produce that deed. Lord Rosslyn made the order, and the cause was tried. That was decided upon the general principle that if the party entered into a discovery of his title, he would in all probability be forced to go to law, and it answered the purposes of justice. If he went to law without that deed he must have been nonsuited.

LORD CHANCELLOR inclined against the motion, alluding to the case of Lady Shaftesbury *v.* Arrowsmith,[1] deciding that the party was only entitled to the production of the deed under which he claimed, distinguishing between a mere bill of discovery in aid of an ejectment and a bill also praying relief in this way, followed up by a motion for a production in aid of an ejectment not under the control of the court, proceeding in equity and at law for the same thing.

July 13.

LORD CHANCELLOR. I have looked into the order in the case of Worsley *v.* Watson, the 20th of November, 1800. The bill was brought against four defendants, stating that Robert Frank was seised in fee,

[1] 4 Ves. 66.

and by indentures of lease and release, dated in 1734, he conveyed two acres, stating the boundaries and the limitations, to the use of Elizabeth Atkinson and the issue of her body lawfully to be begotten; and upon failure of such issue, to William Atkinson, his heirs and assigns for ever. The bill alleged that this deed was then in the possession of the defendant Mary Watson; that Elizabeth Atkinson took possession, and continued in possession till her death, except of such part of which possession was taken by two other defendants, under whom Brown, another defendant, claimed by an under-agreement. Elizabeth Atkinson married Shawe, and the premises were formed into one field. After the death of her husband she entered into an agreement to sell two acres, which included a considerable part of the premises in the indenture. She died without issue in 1799. William Atkinson, the younger, died in her lifetime, and the plaintiff traced his pedigree from him. The bill then stated that Mary Watson, under pretence of the will of Elizabeth Shawe, possessed herself of the deed of 1734, and of other deeds, papers, and writings, relating to the premises; that there was a great quantity of limestone on the premises, and three of the defendants claimed, under contracts made with Mary Watson, to take lime; that the plaintiff was desirous and intended to bring actions of ejectment; that he could not safely without the deed of 1734 and other title-deeds; and the bill suggested irreparable injury, before the actions could be brought, by the defendants taking the limestone. The bill then stated application to the defendant Watson for the deeds, and to the other defendants to desist from taking the limestone and committing waste; and contained allegations in support of the general statement, particularly that the defendant insisted that a recovery was suffered and contending that could not be upon the effect of that limitation in the deed. The prayer was, that she might produce; and leave with her clerk in court the deed of 1734, and all other deeds, papers, and writings relating to the premises; and that the same may be produced at the trial of such action or actions as the plaintiff should be advised to institute; and if it shall appear upon the trial that the plaintiff is entitled, then that the deeds, papers, &c., may be delivered up; and in the mean time for an injunction to restrain the defendants from getting limestone or committing waste, the plaintiff waiving all forfeitures; and for general relief.

This bill, praying a delivery of the deeds, and also general relief, is, upon the authority of Lord Hardwicke in Dormer *v.* Fortescue,[1] a bill not of discovery, but of relief. Some cases intimate that, if the bill was merely for the delivery of deeds, it might not be considered a

[1] 2 Atk. 282; 3 Atk. 124.

bill for relief; I do not see why, for there must be some decree or decretal order directing that delivery.

The answer claimed title under this alleged recovery, which clearly could not furnish a question to be tried at law; and it insisted further upon this fact, that the title-deeds had got into the hands of an attorney, to enable him to carry into effect the agreements with the persons claiming the limestone under the defendant Mary Watson; and he happening also to be the attorney for the persons claiming against her, had got the information in her service, which he made use of for the persons claiming against her; and the answer suggested a doubt whether he had returned all the title-deeds. After the answer an ejectment was brought, and then the motion was made that the defendant Mary Watson may be ordered to leave in the hands of her clerk in court, for the plaintiff's inspection, the deed of 1734, and all other deeds, papers, and writings set forth in the schedule to her answer, and admitted to be in her custody; that the plaintiff may be at liberty to take copies; and that the deeds, &c., may be produced at the trial of the ejectment brought by the plaintiff (without any control of the court). The order was made that Mary Watson do leave with her clerk in court, for the plaintiff's inspection, the deed of 1734, and all other deeds, papers, &c., according to the motion, the plaintiff undertaking to return them after the trial.

With respect to this order, first, I do not find what the deeds were, described in the schedule. But this motion, if the schedule contained any deeds under which the defendant sought to make title against the deed of 1734, was granted directly in opposition to the decree of Lord Thurlow in Burton *v.* Neville,[1] and the order of Lord Rosslyn in Lady Shaftesbury's case. My next objection to this order is, that, though the motion for the discovery and production of the deeds might be right, because those deeds referred to in the answer might be considered as part of the answer, the difficulty is, whether there is any case in which, the bill being filed not for discovery, but for relief, the court, acting upon motion, orders the production in an ejectment brought after filing the bill, and before the cause is heard, and the court not having the opportunity of directing what is proper, if any proceeding at law is necessary; and this bill seems precisely that of Dormer *v.* Fortescue, in which both Lord Talbot and Lord Hardwicke thought all the relief might be given which went to delivery up of deeds and an account of the rents, &c. In this case the court sees it is competent to decide on the question, as matter of law, with or without the assistance of a case sent to law. But if it is the course of the court to take care, both for the plaintiff and the defendant, that there

[1] 2 Cox, 242. — Ed.

shall be no surprise upon justice, was there ever a case requiring more strongly a production on both sides, before the matter goes to law, when it is stated that the plaintiff had got from the attorney of the defendant this information with regard to her own title, and this doubt was suggested in the answer whether he ever returned all the deeds? The authority of that order I question, because I cannot find any case to that extent, and because it goes a length to which Lord Rosslyn refused to act in the case of Lady Shaftesbury, Lord Thurlow in Burton *v.* Neville, and the Court of Exchequer in a case cited in that of Lady Shaftesbury. My doubts, therefore, as to granting these motions remain.

As to the motion in this particular case, there are other reasons against it. This is not a motion for the purpose of having deeds, a discovery of which is sought by the bill, produced in the Master's office, and where the order for the production is made upon the ground that it is only to complete the answer; but it is in a case where there is a bill and an answer, a motion to produce them to the intent that they may be made evidence upon an ejectment brought not under the view or control of the court. The case is a limitation of various estates to various uses; and among them the plaintiff claiming by descent finds a title that was never barred by intermediate acts. A term of ninety-nine years was created in 1690, and was, therefore, run out before the bill was filed. That term, the object of which was to raise portions for younger children, was sold for £2,000. It appears by the answer of Lord Exeter that a fine was levied; and under that the ancestor of Lady Exeter supposed he had become entitled to an estate in fee, and all the other uses were barred. The plaintiff contends that the fine gave no title, and, therefore, claims the possession of this land from Lord Exeter in consequence of the effluxion of time during which the title subsisted. They state that Vernon, being seised in fee of a great number of premises, has so destroyed the boundaries that it is impossible to ascertain them without the assistance of a court of equity. Their bill is upon this ground, that they want discovery to decide whether there must not be a commission to ascertain the boundaries. Certainly it is a duty upon the tenant to keep the boundaries; and this court will aid the reversioner to distinguish them, and even will give him as much land if they cannot be distinguished. Lord Exeter, being only seised of the freehold in right of his wife, from whom he was divorced, is made the sole defendant. He states that he is in possession; that the family, taking themselves to be entitled, have sold to and exchanged with other persons; so that the premises are partly in his possession, partly in that of others. Under these circumstances they bring an ejectment, and say it is ready for trial at Worcester; and

upon motion they desire that that ejectment, not under the control or view of the court, and in a case in which the bill asserts that the sheriff cannot deliver possession if the plaintiffs recover, the deed of 1690 may be produced, and all the subsequent deeds, and that they may be carried down to Worcester; and this under an order of this court, and where the defendant does not represent the inheritance of the estate. I doubt it, first, upon what I have said; secondly, because this case under the circumstances differs totally from that in which Lord Rosslyn made the order I have stated. *Motion refused.*

HYLTON v. MORGAN.

BEFORE LORD ELDON, C. JULY 11 AND 13, 1801.

[*Reported in* 6 *Vesey*, 298.]

MR. THOMSON, for the plaintiff, moved upon the answer for an injunction to restrain the defendant from setting up any outstanding term by way of defence to the ejectment brought by the plaintiff, or any other ejectment he may be advised to bring for recovery of the premises. Notice of trial had been given.

LORD CHANCELLOR. The doubt I have is whether the regular course of the practice of this court is to be broken in upon, and that which would be done all at once, under a decretal order, is to be made the subject of several motions. In proceedings under the control of this court a production is ordered on both sides; and from that production a benefit may arise to the party with whom you are contending at law, as in the last motion there might be papers in the possession of the party applying, from which the identity of the premises would appear. This is quite new practice.

Mr. *Thomson*, in support of the motion, said there was no such question in this case, which was merely a question of title. The bill is filed on the ground of illegitimacy. This application is not for any thing that can prejudice the defendant's title or aid the plaintiff's; but is merely to have a fair trial of the plaintiff's right. The whole object of the bill is reducible to setting aside the outstanding term, which the defendant admits, in order to have a fair trial. That may be done in any stage of the cause.

LORD CHANCELLOR. This happens to be a clear case; but in many instances there must be vast inquiry and expense; and where the defendant has a right to be protected by the decree, is it not bad practice to let a party coming for relief, with regard to which he is to proceed

at law, proceed at law before he entitles himself to that relief? It is deciding the whole equity of the case before the decree. Is the plaintiff to pick out his own mode of proceeding at law, or is not the principle of such a bill that the court directs the mode of proceeding at law under a decree? In general, till the decree, the court must suppose the parties to be litigating upon questionable rights. Put the case that at the hearing the court may find it necessary to direct an issue; or, if the trial should be by ejectment, to give special directions as to admissions, &c. Can it be right that, previously to the decree, an ejectment is to go on at the hazard of proceeding in the very manner the court would have prohibited? I will not act in particular cases against the practice. There are two ways of proceeding. You may get a discovery in aid of an ejectment; but if you will have equitable relief to aid the trial of your title at law, you must have that relief upon a decretal order prior to the trial at law. Suppose, in the case in Atkyns,[1] upon this head of equity, that, when the decree was made, and a production by both parties ordered, the person presumed to be heir-at-law turned out not to be heir, from papers in his own possession, would not the whole expense of the ejectment be thrown away? It will be found that what has been the constant practice of the court is founded in a great deal of wisdom when it is examined. The question now is, whether I should not stay the ejectment till the decree, and then give such directions for a trial at law as may be necessary.

Mr. *Lloyd* (*amicus curiæ*) said that certainly was the practice, and this sort of relief never used to be given upon a motion prior to the decree.

July 18.

Lord Chancellor. This case is similar to the last.[2] The bill is filed for an account of all sums of money received by the defendant, or for her use, on account of the rents and profits from the death of William Morgan. It states the will made in 1788, and the death of the testator, and the possession since. The motion is for an injunction to restrain the defendant from setting up any outstanding term by way of defence to the ejectment brought by the plaintiff, or any other ejectment he may be advised to bring for recovery of the premises. This is also, therefore, a bill for relief, which relief must be grounded upon some proceeding at law. The party, without the control of the court, chooses what his proceeding shall be; and then he will probably drop the bill, and it will have the effect of a mere bill of discovery. If the party chooses to file a bill of discovery, be it so; but if he chooses to file a bill for relief, and take his chance of obtaining it, it is very difficult to make out that the court is to aid him in any step, meaning tc

[1] 2 Atk. 282; 3 Atk. 124. [2] Aston v. Lord Exeter.

drop the relief, and to make it a mere bill of discovery, but not apprising the court of that purpose. In this instance it is a question of legitimacy. The fact is, he was a fellow of a college; and it is stated that he married, and his marriage was kept secret till he removed to a college living; and that there is no pretence for illegitimacy. The plaintiff is a near relation of the family. If, as to the pedigree, as to which, I apprehend, a production would be ordered, it should happen that any thing in the possession of this relation of the family confirmed the allegation that this son was legitimate, is it the same thing to send the party to try the question without any of those provisions which would be secured upon an issue, ordering a production on both sides, &c.? The very thing he is doing is part of the relief; and he takes his relief piecemeal, — part by motion, part by decree. The only cases like it are Bettison v. Farringdon[1] and the Earl of Suffolk v. Howard.[2] It is impossible to follow that last case in some points. The defendant made the deeds part of his answer; and upon that the court seems to have ordered the production, and upon principle; but they did that, I apprehend, upon the ground that the answer offered it; and, therefore, it is not within Burton v. Neville[3] and Lady Shaftesbury's case.[4] Then, as to the annuity, the court seems to have thought there was something very pitiable in it; and the cause does not go on till a decree can be regularly obtained; but the arrears are ordered to be paid in that stage. It is impossible to follow so irregular a proceeding as that. In Bettison v. Farringdon, whether the bill was for discovery or relief, the answer put an end to all possible claim, referring to a recovery; and the answer tendering to the court a case upon which they could determine that the defendant's legal title did not require trying, the court upon motion gave leave to look into that. But the object in both those cases was not to aid a proceeding at law, brought without the view of the court, but to prevent a proceeding at law upon the defendant's insisting it was unnecessary. That is very different. A discovery and production in the Master's office with that view is very different from a discovery and production upon a trial not directed by the court and not under its control. So is a discovery in the Master's office, with a view to see what, in the course of the cause retained in equity, is fit to be done.

I am of opinion, therefore, that it is not fit to aid these experiments at law, after a bill filed, without the authority of the court, and not under its view. Setting aside this outstanding term is relief, and relief enough for you afterwards to go on for an account of rents and profits.

The motion stood over, to give further opportunity of looking into it; and it was not brought on again.

[1] 3 P. Wms. 363.
[2] 2 P. Wms. 176.
[3] 2 Cox, 242. — Ed.
[4] 4 Ves. 66.

ERSKINE v. BIZE.

IN THE EXCHEQUER. MAY 14, 1790.

[*Reported in* 2 *Cox*, 226.]

THE defendant in this cause had set out by his answer the dates and contents of a policy of insurance and other papers inquired after by the bill, but had not admitted them to be in his custody or power.

On a former day the court had made an order on defendant for a production.

Solicitor-General[1] now moved to discharge that order, the defendant not having admitted them to be in his custody or power; and he stated the uniform practice of the Court of Chancery to be to require a direct admission in the answer of the fact of the papers being in the custody or power of the defendant before it made any order for the production; for it was the plaintiff's own fault if he had not such an admission, if the fact were true, since the defendant could not avoid answering it one way or other.

And the court now said they thought this practice the more proper and convenient one, and that the former order ought to be discharged. For, on the one hand, if the defendant had the papers, it was the plaintiff's own fault not to make him confess it; and, if not, it never could be right to make him discharge himself by affidavit. And discharged the former order.

DARWIN v. CLARKE.

BEFORE LORD ELDON, C. FEBRUARY 12, 1803.

[*Reported in* 8 *Vesey*, 158.]

MR. BELL, for the plaintiff, moved that the defendant should produce a power of attorney to collect the effects of a bankrupt who absconded

[1] Sir John Scott.

from his commission about twenty years ago, upon the answer, admitting that such power was executed, and in the usual way craving leave to refer to the same when it shall be produced. But there was no admission that it was in his possession, custody, or power.

Mr. *Grimwood*, for the defendant, objected that there was no charge in the bill that the power of attorney was in his possession or power.

Mr. *Bell* mentioned Gardiner *v.* Mason.[1]

The LORD CHANCELLOR said he was aware such sweeping orders had been made: but the answer would not do, not being an admission that the instrument is in the defendant's possession or power.

Motion refused.

HEEMAN *v.* MIDLAND.

BEFORE SIR JOHN LEACH, V. C. AUGUST 4, 1819.

[*Reported in* 4 *Maddock*, 891.]

THE defendant, by her answer, admitted that at a time past she had a certain deed in her power. Mr. *Shadwell* moved for a production of the deed; but the VICE-CHANCELLOR held, there was not a sufficient admission in the answer to warrant the order, as she did not admit that she had then the deed in her power.

BARNETT *v.* NOBLE.

BEFORE LORD ELDON, C. MARCH 2 AND 4, 1820.

[*Reported in* 1 *Jacob & Walker*, 227.]

THE object of the bill was to set aside a conveyance, as being obtained by fraud. It was moved, on the part of the plaintiffs, that the defendants, the assignees of Ludlam, a bankrupt, might produce the deed at the examiner's office, and at the hearing of the cause. The bill contained no direct averment that the defendants had this deed in their possession, nor had they admitted it in their answer; but the fact was attempted to be collected by inference from some of the circumstances stated by them. The motion had been made before the Vice-Chancellor, who refused it, but said that, under the circum-

[1] 4 Bro. C. C. 479.

stances, the plaintiffs might have leave, though the cause was at issue, to amend the bill by introducing an inquiry whether the deed was in the defendants' possession.

Mr. *Hart* and Mr. *Raithby*, for the motion.

Mr. *G. Wilson*, against it.

In support of the motion, it was contended that the fact of the defendants having the custody of this deed was sufficiently manifest from their answer, and an affidavit of an admission by them to that effect was offered. The reading of the affidavit was objected to, and the objection was allowed by the Lord Chancellor.

March 4.

The Lord Chancellor said he thought the answer of the defendants did not show the deed to be in their power.

I believe the course is, that when a person who is not a party to the suit has a deed in his possession which you are desirous he should produce before the examiner, he must be served with a *subpœna duces tecum*, and, if he then neglects to produce it, you may prove by affidavit that he has it, and put him in contempt. But if a party is to produce a document, I apprehend you must show by his answer that he has admitted himself to have it.

That is not the case here; and the consequence is, that you must, I think, accept the offer made by the Vice-Chancellor, and have leave to amend the bill, to call on them to say whether they have it or not.

ATKYNS *v.* WRIGHT.

BEFORE LORD ELDON, C. NOVEMBER 7, 1807.

[*Reported in* 14 *Vesey*, 211.]

THE bill prayed an account of the execution of a trust under a conveyance, dated the 13th of June, 1783, to two trustees for payment of debts; an account of what had been received from the produce of the trust estates, &c.; containing various charges of fraud and collusion by the defendants, particularly by indentures of lease and release, dated the 20th and 21st of January, 1795, by which one of the defendants, the survivor of the original trustees, was discharged from the trust, and the other defendant was appointed trustee. The charges of fraud were denied by the answers.

A motion was made that the defendant Wright, the new trustee, may leave with his clerk in court the indentures of the 12th and 13th of June, 1783, and several other deeds particularly described, all which deeds he admits by his answer are in his possession; and an indenture, dated the 24th of February, 1802, purporting to be a release to him and other persons, to which by his answer he refers, when it shall be produced; with liberty to the plaintiff to peruse and take copies, &c.; and that the other defendant may leave with his clerk in court all the accounts of the receivers under the trust-deed, and all settled accounts, with receipts and discharges, admitted to be in his hands; the bill of costs in the trust to the year 1787; a deed of indemnity to him from the new trustee, dated the 3d of January, 1794, referred to by the answer; the particulars of a sale of a leasehold house, plate, and furniture, with the application of the produce; with the several other accounts admitted to be in his custody, and also all letters written by the original *cestui que trust* in the latter part of his life to the defendant, &c.

Mr. *Hall* and Mr. *Plowden*, in support of the motion.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Thomson*, for the defendant, opposed the motion, as against the practice.

The LORD CHANCELLOR. Formerly the practice was that where the answer did not describe, either in the body or by schedule, which is part of the answer, the deed of which a production was desired, the court would not make an order upon motion for the production, as it

could not determine by looking at the answer or the schedule whether that production had been made or not; and formerly bills were framed calling upon the party to produce deeds, or to set forth their short contents, &c. If that sort of practice is to be restored, there is no doubt in this instance that, if the bill has in the interrogating part been so framed as to call for an answer that would entitle the plaintiff to move for the accounts and papers referred to in these notices, this answer must be insufficient; for, though it refers to divers deeds, accounts, and papers, it does not describe them. With regard, however, to this particular deed, the release by Atkyns, the bill does not appear to have been drawn with the knowledge that such a deed existed; and the fact of its existence comes out by the answer, and with admission sufficiently distinct upon a fair construction that the deed is in the possession of the defendant Graham, though the words are certainly singular, speaking of deeds before stated, referred, and alluded to; but the answer does not contain an offer to produce that deed as the court shall direct. This defendant has not done what was done in a late case, where, the defendant admitting that he had the deed, and was ready to produce it if the court should require him to do so, Mr. Fonblanque contended that he had not by that form of pleading enabled the court to dispense with the judicial discretion to call for the production or not; and I thought that was not a voluntary offer that ought to fix the defendant, but that it was a submission to the discretion of the court, and no dispensation with the discretion of the court not to order the production if it should not be thought proper to make it. Here is no room to say the answer leaves to the discretion of the court whether, having regard to the justice due to both parties, the court would call upon the defendant to produce that deed. In another case, I said that whether the party was or was not capable of setting forth the contents of the instrument, he had in a great measure set them forth; and for the truth of what he set forth he referred to the instruments; there was, therefore, no question of production, as he made the instrument part of his answer. But this defendant has said, in substance, that he denies all this fraud, negligence, and culpable conduct with which he is charged; and whether his answer is true or false in that respect, here is a deed that is not impeached, viz., a release of all claims whatsoever, as in the said indenture will appear, and claiming the same benefit as if he had pleaded it. He must produce that instrument at the hearing of the cause; but his answer means only that in this stage he does not put his defence upon a plea with *profert*, stating merely that there is such an instrument which is to be his defence if he shall produce it; not otherwise. My opinion is, that upon this bill and answer the plaintiff cannot compel the production in this stage of the cause.

BECKFORD v. WILDMAN.

BEFORE LORD ELDON, C. MARCH 12, 21, AND 27, 1810.

[*Reported in* 16 *Vesey*, 438.]

THE object of the bill in this cause was to set aside two indentures of conveyance of the Quebec plantation in Jamaica, with the negroes, stock, &c., dated in June, 1790, and November, 1791, as obtained by a general agent and solicitor by misrepresentation as to the value and [undue] influence. The defendant was his heir-at-law. A motion was made by the plaintiff that these instruments, admitted by the answer to be in the defendant's possession, may be deposited with the Master for safe custody, upon an affidavit stating generally that there were material variations between them.

The LORD CHANCELLOR. Where the object of the suit is to destroy the deed, the plaintiff has a right to have it produced, and left in the hands of the clerk in court for the usual purposes of inspection, &c.; as from the right to have it set forth in the answer the consequence follows that the instrument itself should be before the court at the hearing; but I do not know an instance of the court's taking possession of the deed in the interval upon mere suggestion in a bill filed with that view. The court will not in this stage of the cause be active in taking the deed out of the hand of the party whose deed it is, unless a special ground is made out, showing that there is reason to believe the deed will not be produced at the hearing. Upon the same principle the affidavit of the solicitor that there is a material difference between these instruments cannot have the effect of establishing that there is that special case upon which in a late instance,[1] at the last seal, I made that order.

March 21.

The motion was renewed upon further affidavit, stating more particularly the variations between the instruments.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Heald*, in support of the motion.

It is very material that these deeds should be produced at the hear-

[1] Lambert v. Chapman.

ing of the cause. They are not only not exact duplicates, but the affidavits point out very important variations. The second deed in date was registered; the other was not, though it was sent to Jamaica for that purpose. The first deed recites that the grantor, having taken into consideration the laborious attention of the agent since his father's death, &c., proposed to convey to him a large tract of land in Jamaica, describing it as containing one thousand two hundred acres, more or less; and the consideration expressed is five shillings. The second deed, having no recital, purports to be a conveyance in consideration of ten shillings, and divers other good and valuable considerations, &c., of one thousand seven hundred acres, and, in lieu of a covenant in the former deed for completing the settlement of the plantation, by which the expense to be advanced by the grantor was limited to £5000, there is a covenant that the grantor shall continue the workmen, &c., without any limitation in extent; and there is also a more extensive covenant for warranty. These very material variations being pointed out, furnishing the ground of most important observation, upon which the decree will probably depend, under such circumstances the court will require that these instruments shall be deposited in the Master's office.

In a late case, Addison *v.* Walker, a motion was made that the draft of a title-deed might be deposited with the Master, on affidavit that the settlement prepared in pursuance of that draft varied from it; the plaintiff being entitled to the estate according to the draft, the defendant according to the deed, and the object of the bill being to reform the deed. The defendant objecting that the plaintiff had no right beyond the liberty of inspecting and taking a copy of the draft, your Lordship considered the variations so important that the plaintiff was entitled at all events to be certain of the production of that draft at the hearing. Applying that authority to this case, there can be no more objection as to the deed of 1790 than as to the draft in that instance; this instrument, not registered, being merely an article of evidence in the cause to prove the fraud alleged.

Mr. *Bell* and Mr. *Shadwell*, for the defendant. Where the object of the bill is to set aside the deed, this order is not to be obtained of course. The instrument must be proved to be material to support the case made; secondly, it must appear that there is great reason to believe that the instrument will not be forthcoming, as in the case of Addison *v.* Walker, where the husband had agreed to a draft of a settlement; afterwards, as appeared by the answer, that draft was altered; a new deed was framed; the defendant, stating that he had not the draft, represented the effect to be a limitation to the husband in fee; but upon the production of the instrument the limitation appeared to be to the

survivor of the husband and wife in fee, a direct contradiction to the answer. It is true, there are material variations between these instruments; the first deed reciting fully the services which were the inducement to the conveyance, as to which the other deed is silent; secondly, as to the covenant by the grantor to lay out money in improvements: by the first deed confined to £5000, by the second unlimited; which is accounted for, however, as a consequence of the omission to register the first deed: a considerable sum having been laid out, the covenant was framed generally with a view to completing the buildings which had been begun; thirdly, the difference in the number of acres. Are such variations sufficient to produce this effect, and what reason is there for supposing that these instruments will be withheld, the answer filed in August stating them both, though as to the first the defendant was not called upon to say any thing?

Mr. *Richards*, in reply, said the most important variations do not appear in the answer; for instance, the difference as to the number of acres was suppressed; and even supposing the plaintiff to have copies of these instruments, the production of the instruments themselves, alleged to be the effect of influence over the grantor, may be most material.

The Lord Chancellor. This sort of motion is very unusual, and may lead to most important consequences. In the case of Addison *v.* Walker, the answer representing the settlement to be pursuant to the draft, and stating the substance of the draft falsely, I thought myself authorized to go rather further than the general practice of the court permits. Whether these instruments are to be considered as title-deeds or not, it is clear that where the object of the bill is to set aside the grant, the court must have the power of so dealing with the instrument as to be reasonably sure of having it produced upon all occasions when its production may be necessary. That sort of title-deed must therefore be produced for the purpose of being proved before the examiner, if necessary for the discovery of its contents, and must be produced at the hearing, if necessary; but the court does not take the custody of it in the interval without a special case. The variations in these instruments, stated this day, do appear to me important; first, the special recital in the deed of 1790; secondly, the general reference by the second deed to divers other good and valuable considerations; thirdly, the variation in the quantity of acres; and, fourthly, the variation in the covenants. They may be accounted for; but they appear to me to be so important that they must be accounted for. The only ground, therefore, upon which the motion can be opposed is the other, — as to the danger that these instruments may not be produced; and I will look into the record with that view.

March 27.

The LORD CHANCELLOR. The foundation of this motion is, that these deeds varied very materially; that those variations would require to be well considered at the hearing; and that there was some degree of *mala fides* in the defendant, calling upon the court to preserve them with more anxiety than in ordinary cases. It appears to me that the variations between the two instruments are material; first, in the recitals; secondly, in the quantities of the premises conveyed; thirdly, in the covenants. With regard to the recitals, however, even if the deeds were lost, and no copies could be proved, yet the benefit of that difference would be had at the hearing, as all that appears in the recitals, and the covenants, and the causes of the difference, are stated in the answer. The only point, therefore, upon which this extraordinary application rests is the difference of the quantities, and the circumstance that the quantity of acres conveyed by the first deed is not mentioned in the answer; but upon the whole answer that does not appear to be a fraudulent concealment. Therefore all that can be done upon this motion is an order for a production of the instruments at the hearing.

PICKERING v. RIGBY.

BEFORE LORD ELDON, C. MARCH 7, 1812.

[*Reported in* 18 *Vesey*, 484.]

IN a suit between the executor of a deceased partner and the survivor for an account, the defendant moved, before answer, for a production and inspection of the partnership accounts.

Sir *Samuel Romilly*, in support of the motion, said it was reasonable, though perhaps new: there were instances of refusing such a motion for the production of deeds, but none as to partnership accounts. But upon a statement by answer that the defendant cannot make the discovery completely without seeing the books, &c., which he believes are in the plaintiff's hands, proceedings would be staid without a cross-bill.

Mr. *Hall*, for the plaintiff, resisted the motion, as contrary to practice, contending that the defendants ought to file a cross-bill; these books and accounts may not be in the plaintiff's possession, and the bill has no such statement.

The LORD CHANCELLOR. I do not recollect a single instance of such a motion granted; but the object may be obtained in another way. Where the executors of a deceased partner, filing the bill for an account, have got all the partnership books and accounts, as the defendant verily believes (for he cannot carry it further, and to that for this purpose it must be carried), the defendant by his answer swearing that he cannot put in a better answer, as he has not the partnership books and accounts, that, it is true, ought to be sufficient; but, as it tends to the delay of justice and to perplexity, and as a cross-bill must be for an account as well as discovery, I think I remember this kind of motion by the defendant, stating by his answer that the bill calls for a discovery, which he cannot make completely without seeing the partnership books and accounts, and he verily believes those books and accounts, to the joint possession of which both were entitled, are in the hands of the plaintiff, that the court would stay proceedings against him for not putting in his answer, until he has been assisted with that inspection. That sort of motion will do without a cross-bill; but this motion must be refused.

MARSH *v.* SIBBALD.

BEFORE LORD ELDON, C. MARCH 1, 1814.

[*Reported in* 2 *Vesey & Beames*, 875.]

MR. LEACH, on a motion for the production at the trial of an action of books and papers referred to by the answer, admitted that the motion went further than any former instance, as extending to a book referred to by the answer of another defendant, not the plaintiff in the action, such a production having been ordered only in the instance of a trial directed by the court, in which case one defendant would not be allowed to withhold evidence from another.

The LORD CHANCELLOR. The rule as to producing papers upon a trial at law is this. If this court, on motion or by decree, directs a trial, that trial is directed in such a way that all productions which the court conceives to be useful upon that trial, the creature of its own direction, shall be made; but if upon a bill filed for an injunction against an action, and praying relief, the injunction being refused, they go on at law to trial, the plaintiff can only read by the direction of this court what he may read without that direction, — the answer; and then he may read every book, letter, memorandum, or paper referred to by that answer, as ever such book, letter, &c., is a part of the answer. It is read as being part of the answer; and the plaintiff must show that what he prays may be produced is in effect and substance part of that answer, unless the trial is directed by the court itself on motion, or by decree; but there is no instance of directing the answer of any other person except of the defendant in that cause, or any part of it, to be read upon a trial not directed by the court itself. If, therefore, this book is not referred to by the answer of the defendant, I cannot order it to be produced, and you must get at it by amending your bill. You are entitled to the general production, in the usual form, of all the papers referred to by the several classes of defendants respectively, as part of their answers, for the general purposes; but that will not answer your object without proceeding to order a production at the trial, and that is limited in the manner I have stated.

BENJAMIN MICKLETHWAIT, AND MARY HIS WIFE, AND OTHERS *v.* JOHN MOORE, AND SARAH HIS WIFE, AND OTHERS.

BEFORE LORD ELDON, C. AUGUST 11, 1817.

[*Reported in* 3 *Merivale*, 292.]

THE bill was to set aside a partition of estates to which the plaintiffs Micklethwait and wife and the defendants Moore and wife were entitled, in right of the respective wives as coparceners, and for a new partition. The grounds upon which the former partition was sought to be set aside were gross inequality in value, and concealment and fraud on the part of the defendants; and the former part of the charge was sought to be supported in the bill by a statement "that the whole of the estates in question had lately been estimated and valued by Mr. Thomas Gee, an eminent land valuer and commissioner under acts of inclosure, and that the whole of the minerals had been also lately valued by Mr. Andrew Faulds, an experienced mineralogist; and from such valuation and estimate (which was alleged to be a true and accurate valuation and estimate) a summary statement whereof, and also of the valuation of the two lots made previous to the execution of the deed of partition (which was sought to be set aside), the plaintiffs had set forth in a schedule to their bill, it appeared (as it was alleged the fact was) that lot 1 (the share of the defendants) consisted of 213*a.* 2*r.* 38*p.*, and was worth £19,915, and that lot 2 (the share of the plaintiffs) consisted of 111*a.* 2*r.* 15*p.* only, and was worth £8,003 5*s.*"

The defendants Moore and his wife, by their answer, denied the charges of fraud and concealment, and also of inequality of value at the time of the partition, accounting for any present inequality which might exist from the change of the times operating on the value of different species of property, and from subsequent alterations and improvements in the share of the defendants; and with regard to the valuations said to have been made by Messrs. Gee and Faulds, they denied the accuracy of such respective valuations, but said that in the statement set out in the schedule to the bill the gross amount of the

same only was given, the particulars, annual value, and number of years' purchase on which the same were calculated being omitted in the said statement, and therefore they (the defendants) were unable to state in what particular respects the said valuation and statement were incorrect and imperfect.

A motion was now made, on the part of the defendants, "that the plaintiffs might in fourteen days leave with their clerk in court the entire valuation and estimates of the estates mentioned in the bill to have been made by Mr. Thomas Gee, with the observations, remarks, and letters of the said Thomas Gee relating thereto, and the entire valuation and estimates of the minerals mentioned in the bill to have been made by Mr. Andrew Faulds, with the observations, remarks, and letters of the said Andrew Faulds relating thereto, and any instructions given in writing by the plaintiffs or any of them, their or any of their agents or solicitors, to the said Thomas Gee and Andrew Faulds, or either of them, respecting the same, with liberty for the defendants, their clerk in court, agents, or solicitors, to inspect or peruse the same, and to take copies, abstracts, or extracts thereof; and also that the defendants, or any of them, after having inspected and perused the said documents, may be at liberty to amend their answer or respective answers to the said bill."

Bell and *Harrison*, in support of the motion, referred to Pract. Reg [1] tit. "Deeds and Writings," where it is said, "Where a deed in the plaintiff's hands, mentioned in the plaintiff's bill, was necessary to the defendant's making his defence a full answer, the court ordered the plaintiff should give him a copy of it." In an anonymous case in Dickens,[2] which was an application by a defendant against the plaintiff (an executor) for payment into court of a balance alleged in the bill to be in the hands of the plaintiff, Lord Thurlow expressed his surprise, saying, "Did you ever know an instance of a defendant's applying against a plaintiff, *even to produce deeds?* If you want it, you must file a cross-bill for the purpose." However, in a late case of Pickering *v.* Rigby,[3] which was a suit for an account between the executor of a deceased partner and the surviving partner, the defendant having moved, before answer, for a production and inspection of the partnership accounts, which was resisted on the ground that the defendant ought to have filed a cross-bill, his Lordship, though he refused the motion, suggested that if the defendant in such a case had put in an answer, stating that the bill called for a discovery which he could not make completely without seeing the partnership books and accounts, the same being in the hands of the plaintiff, it might be possible for him to obtain such an order without filing a cross-bill.

[1] Wyatt's ed. p. 161. [2] 2 Dick. 778. [3] 18 Ves. 484.

Pepys, contra. In Davers *v.* Davers,[1] the court discharged an order which had been obtained by the defendant to inspect a deed proved by the plaintiff in the cause and referred to by the deposition. In Wiley *v.* Pistor,[2] his Lordship refused a motion by a defendant for inspection of letters referred to by the plaintiff's depositions as exhibits, with costs, observing that such an application must be very familiar if there were not some objection to it, and he never heard of such a motion. Even a plaintiff, though he has a right to the inspection of deeds admitted to be in the defendant's possession, upon which his own title rests, cannot compel the production of those relating only to the defendant's title which is independent of his own, as was determined by Lord Hardwicke in Buden *v.* Dore.[3] And in Atkyns *v.* Wright,[4] the court refused a motion for a production of deeds and papers, referred to as in the defendant's possession, but not described by the answer or schedule, and without an offer to produce them.

The Lord Chancellor asked whether the plaintiff by his bill stated the documents in question to be in his possession; and was referred to the statement in the bill already mentioned, which was contended by Bell to be equivalent, the valuation being alleged to be made with a view to the present suit for a new partition.

The Lord Chancellor. The case cited of Pickering *v.* Rigby is very different from the present. There the bill was for an account of partnership dealings; the plaintiff and defendant were jointly entitled to the possession of the documents the production of which was the object of the motion, and I then stated that I thought I remembered an instance of an application by a defendant under such circumstances to stay proceedings for want of an answer until he had been assisted with the inspection sought; and that that sort of motion might do without a cross-bill. But this case goes much further than any I have ever yet heard of, and even if a cross-bill were filed (which is the usual course), I should not here be able to compel the production of these documents.

Motion refused with costs.

[1] 2 P. Wms. 410.

[2] 7 Ves. 411.

[3] 2 Ves. 445. ["July 22, 1752. The bill stated a title, and that certain old terms were standing out. Defendant did not plead thereto, but set up a title inconsistent with the plaintiff's, though he might have pleaded it. Exception to the answer for not setting out what deeds and writings defendant had relating to defendant's title. The Master allowed the exception.

"Lord Chancellor allowed the exception to the report; for that you cannot come by a fishing bill in this court, and pray a discovery of the deeds and writings of defendant's title. If indeed there was any charge in the bill, general or special, that defendant had in his power deeds and writings of plaintiff's title, an answer must be given thereto." — Ed.]

[4] 14 Ves. 211.

EVANS v. RICHARD.

BEFORE LORD ELDON, C. JANUARY 15, 1818.

[*Reported in* 1 *Swanston*, 7.]

THE defendant, an English subject, being in America during the war with this country in July, 1814, entered into an agreement with the plaintiff, an American citizen, to make on his return to England a shipment of certain goods to America, on the joint account of himself and the plaintiff, provided that the war should then continue, and not otherwise. On his return to England the defendant accordingly shipped goods to America, but not till after the signature of preliminaries of peace; and from the plaintiff's conduct had reason to think that, for the purpose of declining any share in the adventure, he designed to avail himself of the objection that the shipment was made, contrary to the terms of the agreement, after the cessation of war. The defendant having brought an action against the plaintiff to recover a balance due in respect of certain other transactions, the plaintiff filed this bill for an account of the profits of the shipment to America, and obtained an injunction to restrain the defendant's proceedings in the action at law. On a former day the Lord Chancellor dissolved the injunction, considering the contract as a trading undertaken with an alien enemy, in fraud of the laws of this country, and not entitled to the aid of the court. An order having been afterwards obtained, on a motion before the Vice-Chancellor, for the production of certain letters and other documents referred to in the answer, the defendant now moved to discharge that order, on the ground that the court having declared the contract illegal, and the plaintiff not entitled to relief in equity, no advantage could be derived from the inspection of the papers.

The *Solicitor-General*[1] and Mr. *Bickersteth*, in support of the motion.

The LORD CHANCELLOR. The event of this motion must depend on the fact whether the answer contains an admission that the documents in question are in the custody of the defendant. When the court orders

[1] Sir Robert Gifford. — ED.

letters and papers to be produced, it proceeds on the principle that those documents are by reference incorporated in the answer, and become a part of it. Being in the office, the effect is the same as if they were stated in *hæc verba* in the answer. This motion, therefore, in effect seeks to strike out a part of the answer. The plaintiff may amend his bill by omitting the allegation from which the illegality of the contract appears, and the admission remaining in the answer entitles him to the production of the papers.

THE PRINCESS OF WALES *v.* THE EARL OF LIVERPOOL AND COUNT MUNSTER.

BEFORE LORD ELDON, C. MARCH 7, 10, AND 17, 1818.

[*Reported in* 1 *Swanston*, 114.]

THE bill filed by Her Royal Highness Caroline Augusta, Princess of Wales, by Antony Buller St. Leger, Esq., her next friend, stated that in or about the month of August, 1814, William, Duke of Brunswick Oels, deceased, for the purpose of securing the sum of £15,000 sterling to the separate use of Her Royal Highness, signed and delivered to her a certain promissory note or instrument in writing, bearing date the 24th day of August, 1814, whereby he assured to her the repayment in the year 1816 of the sum of £15,000 sterling, with interest in the mean time; and also for the same purpose signed and delivered to her another promissory note or instrument in writing, bearing date the same 24th day of August, 1814, whereby he assured to her payment in the month of August, 1816, of the sum of 15,000 French louis, at the rate of 24 French livres each, together with interest for the same in the mean time.

The bill then stated that the duke died in June, 1815, having made a will and appointed the defendants executors, who proved the will, and possessed themselves of his personal estate to an amount more than sufficient to satisfy his debts, and that the principal sum secured by the two notes, together with interest from the 24th of August, 1814, was due to the plaintiff for her separate use.

The bill contained the following interrogatories: "Whether, in or about the month of August, 1814, or when, the said William, late Duke of Brunswick Oels, for the purpose of securing the sum of £15,000 sterling to the separate use of her said Royal Highness, did not sign and deliver to her two promissory notes of such date respectively, and of such tenor and effect as hereinbefore in that behalf mentioned, or of any and what other date respectively, or of any and what other tenor and effect respectively? and whether the said principal sum secured by the said notes or instruments, together with interest on the

said sum from the 24th of August, 1814, is not now wholly due and owing to her said Royal Highness?"

The bill prayed that the defendants might either admit assets of the duke sufficient to pay the principal sum of £15,000 and interest, or that an account might be taken of his personal estate in the usual manner, and that the same might be applied in a due course of administration, and that, if necessary, an account might be taken of what was due upon the said notes, and that the amount thereof might be paid to the plaintiff for her separate use.

A motion was made by the defendants "that the plaintiff might produce, and leave with her clerk in court for the usual purposes, a certain promissory note or instrument in writing in the bill mentioned to bear date the 24th day of August, 1814, whereby it is in the bill alleged that William, Duke of Brunswick, deceased, assured to the plaintiff payment in the month of August, 1816, of the sum of 15,000 French louis, at the rate of 24 French livres each, together with interest for the same in the mean time; and that the defendants might have a fortnight's time to answer the bill after such instrument should have been so produced."

In support of the motion, an affidavit was made by Count Munster that he was advised and believed that an inspection of the note described in the notice of motion might afford to him and the other defendant, the Earl of Liverpool, material information for their defence; and that the note had never been shown to him, nor, as he was informed and believed, to the Earl of Liverpool.

The *Solicitor-General*[1] and Sir *Arthur Piggott*, in support of the motion.

In an action at law the plaintiff could not compel the defendant to plead until a copy had been delivered of the written instrument on which the action is founded. When the instrument is under seal the plaintiff must make *profert*, and the defendant may crave *oyer;* and by analogy to those cases the modern practice in actions on written instruments, though not under seal, as bills of exchange and policies of insurance, entitles the defendant to a copy for the purposes of his defence. It cannot be supposed that a court of equity rejects that equitable principle which is thus adopted by the courts of law. By a cross-bill it is admitted the defendants might compel production of the instrument, and compel it for the purpose of defence to the original suit; admitting that, can we consistently deny to the court a power to order the production in that suit in which alone the production is required? Inspection of the instruments is in this case necessary to enable the defendants to make that answer which the plaintiff seeks

[1] Sir Robert Gifford. — Ed.

The bill contains interrogatories whether the promissory notes were not signed by the Duke of Brunswick, and whether the sum secured by them is not still due. Supposing a doubt of the authenticity of the instrument (which I put only hypothetically, but on which so put I am entitled to argue), of the signature of the duke for example, is it not obvious that inspection is necessary to enable the defendants to answer with correctness and safety? Were the duke now living, and a defendant, it might be contended that he could answer from his own knowledge these questions relative to his own acts; but by what means can the defendants, his executors, no parties to the transaction, without a view of the instrument, answer to its authenticity? The statement in the bill is, that two securities were given for the same sum, payable in different currencies and at different dates. What assurance has the court that, while one of these instruments is put in suit here, the other may not be enforced against the duke's assets in a foreign state?

Sir *Samuel Romilly*, Mr. *Martin*, Mr. *Bell*, and Mr. *Shadwell*, against the motion.

If the defendants are entitled to succeed, the motion must be quite of course; the case of a creditor filing a bill for payment of a sum due on a security is one of daily occurrence, yet no precedent has been produced of such an order. The analogy suggested between the practice at law and in this court is unfounded. It is true that in an action on a bond the plaintiff must make *profert;* but it is equally true that the practice here is different. In a case in which a plaintiff had stated the substance of a deed in his bill, and referred to it for greater certainty, your Lordship decided that the defendant could not compel production on motion, but must proceed by a cross-bill. What is there in this case to entitle the defendants to a course of practice quite new? The difficulty in the way of their answering is altogether imaginary. What difficulty can they find, if such is the fact, in stating that they have no knowledge of the transaction, and leaving the plaintiff to make proof of every part of her case? The statement in the bill that two securities were given for the same sum is to the disadvantage of the plaintiff; before a decree can be obtained both must be proved and delivered up. The motion is opposed by two decisive objections: according to the uniform practice of the court a defendant cannot obtain discovery except by a cross-bill; and even by a cross-bill discovery can be obtained of those matters only which are material to the defence. In this instance the defendants seek by motion production of an instrument constituting not their defence, but the plaintiff's title. It is a ground of demurrer to a bill of discovery that it requires a disclosure of a part of the opponent's case. The evidence of one party may certainly be material to support the case of the other; in a deed, for instance, which

is the foundation of the title of the plaintiff at law, the recitals may serve to establish the pedigree of the defendant, and he may for that reason be entitled to the production of that deed, but entitled to it still on the same principle as constituting a part of his own case. A reference to this principle evinces the necessity of adhering to the rule that a discovery can be obtained only by filing a bill which imposes on the party the duty of stating his case, and affords to his antagonist the opportunity of controverting it. Suppose to a bill for a discovery of a deed as containing matter important to the plaintiff's case, an answer were put in denying that the deed contained such matter, would the court, in opposition to that answer, on a mere allegation in the bill enforce discovery? If such an attempt can succeed, what will become of pleas of purchase for valuable consideration to bills for discovery of deeds? In seeking a production of this document, their object is to destroy its effect. The court will not try the question of their right to inspection on this summary application, but, by restricting the defendants to the ordinary course by bill, will enable the plaintiff to make a defence.

[The LORD CHANCELLOR. It is a circumstance, in my opinion, of considerable importance to the practice that the bill does not state this note to be in the custody of the plaintiff. If a cross-bill had been filed, and the answer had not admitted possession of the document, would the court on that record have ordered the production?]

That alone is a decisive objection to the application. But admitting, for the purpose of the argument, that in certain excepted cases production may be obtained by a defendant on motion, at least the materiality of the discovery must be distinctly and positively averred. The affidavit on which this application is founded states only that the deponent has been advised that from inspection of the instrument something may arise material to the defence. Such an affidavit would not be sufficient to extend the common injunction to stay trial.

The LORD CHANCELLOR. On a case of so much importance to the practice of the court I will not at once give final judgment.

It has been the practice for ages in courts of law to insist on a *profert* of specialties; but it is within my own recollection that where an instrument is lost, of which *profert* should otherwise be made, those courts adopting a special mode of proceeding have assumed a jurisdiction which was formerly exercised exclusively by courts of equity. They have done so on the supposition that they were doing what courts of equity did; but I believe it will be difficult to admit that in the exercise of that jurisdiction they have acted between the parties as this court would act. That, however, is the principle on which they

have since proceeded in compelling, on motion, the production of bills of exchange or promissory notes, the subjects of an action; and I believe that Lord Mansfield first adopted that rule on the supposition that he did no more than was constantly done in courts of equity. Speaking with all the deference due to Lord Mansfield, it does not appear to me that he exactly recollected what a court of equity would do in such a case; because there is a mighty difference between simply producing an instrument and producing it in answer to a bill of discovery, where the defendant has an opportunity of accompanying the production with a statement of every thing which is necessary to protect him from its consequences. On the present case we must refer to the practice of this court, and, admitting that there may be exceptions to the rule of practice, we must also admit that great care must be taken in each particular instance to ascertain that the case of exception actually exists. It becomes, therefore, necessary to consider the case with reference to all our rules for compelling production of instruments, whether instruments mentioned in the bill or in the answer, recollecting what those rules require the plaintiff in the one case and the defendant in the other to admit relative to the possession of the instruments. The bill states the existence of a double security for the same sum; we must see what is alleged with regard to the possession of that security in the bill and (no answer having yet been filed) in the affidavit, observing that from whomsoever the affidavit may proceed, it must, if to be made the foundation of an exception to the rule, contain a statement of the circumstances constituting the case of exception. I will look into my own notes of the practice before I give judgment.

March 10.

On this day the Lord Chancellor, after stating the case, pronounced judgment as follows:—

For the purpose of illustrating what I shall say presently, I observe here that this bill does not represent the notes as in the custody or power of the plaintiff; and it would be a consideration worthy of attention, regard being had to what is settled by the court with reference to the production of instruments by defendants, how far that circumstance is material. It would be contended, on the one hand, supposing that the production can be compelled on motion, that if the plaintiff has not stated that the instruments are in his possession, custody, or power, he does not afford the same case for an order of production as a defendant must, against whom the order is never granted, except on the statement that the instruments are in his custody or power,—a

statement which, according to the modern doctrine, he is not understood to make when he only refers to the instruments. In Bettison v. Farringdon,[1] to a bill for relief, the defence was that a recovery had been suffered which barred the plaintiff's right, and the answer referred to a lease and release making a tenant to the *præcipe*, and leading the uses of the recovery; on motion, Lord Talbot ordered the production of the deed, merely on the ground of that reference in the answer, assigning as his reason that as it must be produced at the hearing, it ought to be produced on motion. Subsequent cases appear to question that doctrine on both its points. In Lady Shaftesbury v. Arrowsmith,[2] and in Burton v. Neville,[3] the court held that a plaintiff has a right to call for the instruments creating the estate tail under which he claims, but expressed great doubt whether he can call for the instrument on which the defendant frames his title; and later decisions seem to have established that it is not the mere reference that makes the documents part of the answer for the purpose of production, though by amending the bill and addressing further questions the plaintiff may perhaps compel the defendant to make those documents part of the answer for that purpose. On the other hand, a question may be made whether, on a bill framed like the present, the court would not assume that the documents on which the plaintiff comes here to make his demand are such as he can proffer to the court? Whether, if a plaintiff, not stating that certain written instruments are in his custody, yet founds a claim on those instruments, the court will not infer that he has possession of them, unless an affidavit is made to the contrary? On that point I give no opinion.

The answer now called for is an answer which is to apply itself to the interrogatories with respect to these two notes; and it has been observed that there is a singularity in this case, arising from the circumstance that, though the date of the bills is stated, no mention is made of the period at which they were actually framed: two notes are given, apparently of the same date, for payment of the same sum, and where it is obviously clear, therefore, that if the demand can be substantiated at all against the defendants, they possess an unquestionable right to have both the securities delivered up, and to call on the court to take care that, while the plaintiff is enforcing payment against the assets of the Duke of Brunswick, justice is done by protecting those assets against all possibility of further suit in respect of both these documents. The motion is made on a supposition that the instruments can be so dealt with by the court, and for the purpose of framing an answer to the interrogatories which I have stated.

[1] 3 P. Wms. 363. [2] 4 Ves. 66. [3] 2 Cox, 242, cited 4 Ves. 67.

The general doctrine of the court as now settled I take to be this: that when a bill is filed it will depend entirely on the manner in which the defendant expresses himself with respect to any instrument for which the plaintiff may have a right to call, whether the plaintiff can compel from that defendant production on mere motion. If the defendant states in his answer that there was such a deed, though the plaintiff may have an interest in its production, it seems of late settled that that is not enough, but that he must in some way fix the defendant with possession of the deed. I understand that practice to have proceeded on this consideration, that if an order for production were made, and the defendant refused to produce the instrument, the court would find itself unable to apply its process for enforcing obedience, because no *constat* appears on the pleadings that the instrument is in possession of the defendant, and that he has the power to obey. It is therefore usual to amend the bill, and, by introducing an allegation that the instrument is in the possession of the defendant, to call for such an admission in the answer as will authorize the order. On the other hand, it is stated that if the defendant wants production of deeds from a plaintiff who has not said, what by his bill he may say, that he has left the instruments in the hands of his clerk in court, in order that the defendant may inspect them, nor prayed, as our ancient bills used to pray, that after inspection the defendant may answer the interrogatories applied to that subject, the general rule of the court has been this: that the defendant must file a cross-bill in order to obtain discovery of those deeds. In the argument it has been said that courts of common law do, what, unless I misunderstand their modern practice, they certainly would do for asking, namely, that where a plaintiff in the declaration founds his demand on a written instrument, as a promissory note, those courts would give to the defendant inspection of that instrument, in order that he might see by whom it was written, whether on a stamp, and with the other requisites. I believe that that doctrine originated in courts of law, on the notion that there was no reason why they should not do what is done by courts of equity; and the same principle has introduced their modern practice of dispensing with *profert* in cases of lost instruments.[1] When I entered Westminster Hall the doctrine was that where the rules of law required *profert* the party must come into equity. I state it as the opinion of that great man, Lord Hardwicke, as I have repeatedly seen it in his handwriting among his manuscripts, that no such thing could be done at law. Many doctrines have been introduced into courts of law on a supposed analogy to the practice in equity, but without the guards with which

[1] See Read *v.* Brookman, 3 T. R. 151; Hendy *v.* Stephenson, 10 East, 55.

equity surrounds the case; as in the instance of dispensing with *profert*, no man can enter this court without guarding his entrance by sanctions which the courts of law cannot impose; and it happens whimsically enough that there are cases in which courts of law, proceeding on the principle of giving a remedy because one might be obtained in equity, have compelled the party to resort to equity for protection against that practice at law. When courts of law held that because the production of promissory notes might be obtained in equity, they would compel the plaintiff to produce them, they forgot that in equity, if the promissory note will not on the face of it furnish explanation, the defendant to the cross-bill accompanies the production with an explanation by his answer of all the circumstances, and that the mere compulsory production would deprive him of the safeguards which this practice affords. On the other hand, the party cannot have an answer to a cross-bill till he has himself answered the original bill. If there is a necessity, therefore, that he should have production before answer, — a necessity founded on special circumstances clearly manifested, — the rule of this court would work injustice unless it admitted relaxation and exception. That such an exception was long ago contemplated is clear from a passage in the original text of the Practical Register[1] (a book of considerable authority), in which it is said, "Where a deed in the plaintiff's hands, mentioned in the plaintiff's bill, was necessary to the defendant's making in his defence a full answer, the court ordered the plaintiff should give him a copy of it;" and it seems to me that if no authority could be produced, the obvious justice of such a position would well authorize the court to make a precedent upon the subject. There is no general rule with respect to the practice of this court that will not yield to the demands of justice. In the case of Beckford *v.* Wildman,[2] where something more was sought than that the defendant should produce and give a copy of the instrument, namely, that the instrument should be kept in the custody of the court till the hearing, because, if not then produced, the justice arising out of variations between that deed and another with which it was to be compared would be defeated, it was laid down that the general rule would under circumstances yield so as to admit an exception; and though in that instance the court, not thinking that the circumstances required it, refused to go beyond the general practice, it referred to former examples in which the strict rule had been sacrificed to the justice of a particular case.

Such is, in my opinion, the general doctrine on this question; but it appears to me, I confess, very clear that the affidavit on which this

[1] P. 161 of Mr. Wyatt's edition. [2] 16 Ves. 438.

motion has been made falls short of establishing the existence of that necessity which can alone justify a deviation from the practice. It is obvious that it may be material that these instruments should be seen in order to ascertain whether they have reference to each other as duplicates; whether they contain important variations; whether they are written on stamps; and it must not be forgotten that the defendants will be entitled to have them delivered up at the hearing; for I cannot agree that the court will be content with an indemnity against the consequences of their not being delivered up, at least that proposition is extremely questionable. But the affidavit amounts only to this (as a negative inference I take it that Count Munster must have seen one of these notes; Lord Liverpool makes no affidavit, knowing probably less of the matter, but for any thing that I judicially know he may have seen both): the statement is that Count Munster is advised that an inspection of the instrument may afford to the defendants material information for their defence, that is, it may or may not afford it. How can it be said that this expression "may afford" points out the necessity alluded to in the passage which I have quoted? It appears to me impossible. This motion requires an affidavit stating more strongly the necessity, and in some measure the grounds on which the necessity arises. Unless those grounds are to a certain extent stated, it is impossible to be sure that the court is not compelling a production which the circumstances do not require. It seems to me that the right mode of disposing of this case is to dismiss the motion, unless the defendants produce an affidavit of special circumstances.

By a further affidavit Count Munster stated that he was informed and believed that, near the end of the year 1816, the plaintiff sent to one of the executors of the Duke of Brunswick, who had not proved the will, two instruments in writing, one in the German and the other in the French language, both dated 24th August, 1814, purporting to be engagements on the part of the duke to pay to the plaintiff in two years £15,000 sterling with interest; that upon inspection of those instruments by the deponent in February last, the handwriting, construction, and spelling appeared not equal to those of the late duke, and the signature was "Brunswick and D'Oels," which had not been used by the duke since his return to his dominions in 1813; that he was informed and believed that in April, 1817, the plaintiff caused the instrument stated in the bill for repayment of 15,000 louis de France to be produced for payment in Brunswick; and that he was advised and believed that, previous to putting in his answer to the bill, it was necessary, in order that his answer might fully meet the case, that he should have inspection of the last-mentioned instrument.

March 17.

The LORD CHANCELLOR. I have read the affidavit, and it is enough to say that it lays a sufficient ground for deciding that the defendants are entitled to a production of the instrument before answer. The plaintiff is at liberty to come at any time in reply to this affidavit, it being understood that in the mean time the defendants shall not be called on to answer till a fortnight after this note has been produced.[1] I take that to be the proper rule of the court.[2]

[1] More than a year having elapsed without a production of the note, an order was made, July 26, 1819, dismissing the bill with costs. See 8 Swanst. 567. — ED.

[2] In an anonymous case, to be found in 2 Dick. 778, Lord Thurlow is reported to have said, "Did you ever know an instance of a defendant's applying against a plaintiff, even to produce deeds? There cannot be any; it hath been denied. If you want it, you must file a cross-bill for the purpose."

WHYMAN *v.* LEGH.

IN THE EXCHEQUER. JUNE 26, 1818.

[*Reported in* 6 *Price*, 88.]

THIS was a demurrer to a bill filed for a discovery of the defendant's title to certain tithes, for an account of which he had filed a bill, as impropriate rector of Prestbury, in the county of Chester.

The present plaintiff's bill charged the said suit still depending; that the defendant had, or had had, in his possession, certain conveyances, deeds, &c., by which he, or the person entitled to the tithes sought, had conveyed, or intended to convey them; and that the said tithes were not purchased by, or well and sufficiently conveyed to, defendant, or the party from whom, &c.

The bill then charged more particularly certain conveyances (describing them by their dates and parties), wherein the tithes had been conveyed to persons, inconsistent with any title being in the defendant, and that such deeds were in his possession, &c.; and also that the said tithes had been severed and devised for a term of four hundred years still outstanding, chargeable with the payment of certain annuities, and not vested in defendant, and that there were other outstanding terms and divers family settlements affecting the right to the said tithes, whereby it would appear that the defendant was not entitled thereto.

The bill then stated that within a certain township within the said rectory there was a modus on the part of the occupiers who had corn and hay on their lands, of a tenth kiver or ryder (a quantity of ten sheaves), in lieu of the tithes of corn and hay: and as to the occupiers whose lands produced hay and no corn, sixpence for every day's math of upland, and one shilling for every day's math of watered meadow, the day's math being half an acre of customary, or an acre of statute, measure; and that the defendant had in his possession or power divers books, &c., which would prove and establish the said moduses, and which he refused to produce.

To that bill the defendant filed a general demurrer, which came on to be argued in last Easter term, by *Dauncey* and *Spence*, for the demurrer, and *Agar* and *Simpkinson*, for the bill, when the court held

that, the bill having stated that there existed a modus, and therefore required an answer as to that part at least, the general demurrer must be overruled.

Leave was then asked to withdraw the present demurrer for the purpose of confirming it, and demurring more particularly, and at the same time answering such parts of the bill as required to be answered.

That application was opposed; for that thus a defendant might, on every occasion, first demur generally, and, having taken the opinion of the court, might withdraw, and demur more particularly according to exigencies; all which operates in delay of the discovery; but the court gave leave as prayed, on terms of payment by the defendant of the full costs, to be taxed as between party and party. *Vide* 2 Sch. & Lefr. 199, 212.

The second demurrer now came on to be argued.

The defendant on this occasion had demurred to so much of the bill only as sought the discovery of his title-deeds, taking the charges severally on that point; and as to the charge of moduses, and the possession of papers, books, &c., which would establish them, he answered, by submitting the point to the court, and a denial of the facts.

Dauncey and *Spence*, for the demurrer, objected that the present was nothing more than a mere experimental fishing bill, filed, not *bona fide* for the purpose of the discovery affected to be sought, but to harass the defendant in his other suit, and that it was vague and uncertain, without precision in its object, if it had any beyond an attempt wantonly and at random to expose the defendant's title-deeds, without setting up any title in the plaintiff. Buden *v.* Dore.[1]

And they also objected that the plaintiff had stated no fact to show the court that there existed any thing entitling him to call on the defendant for the indefinite discovery sought; that even if the defendant had in his possession the deeds, &c., alluded to, the plaintiff could not oblige him to produce them, without showing that he had a common interest with the defendant in them: Burton *v.* Neville;[2] and they mentioned that a demurrer in all respects precisely similar had been lately allowed by the Vice-Chancellor.

Clarke and *Agar*, contra, contended that the present bill was not of the description which had been given to it; that the object of it was merely and fairly to know from the defendant whether he had in point of fact any pretence for setting up a title to the tithes sought;

[1] 2 Ves. sen. 444. [2] 2 Cox, 242.

and they cited the cases of Stroud v. Deacon[1] and Metcalf v. Hervey.[2] In this case it might appear by the very deed under which the defendant claims title that the tithes were reserved.

Dauncey having replied,

RICHARDS, Lord Chief Baron. The question put is, merely whether the defendant has not in his possession certain deeds, which, if produced, would show that he had no title. The plaintiff does not ask the production of the deeds, unless that should be so in point of fact, — unless he has deeds in his possession which destroy his pretended title, and show him to be a stranger.

Suppose that this had been a cross-bill filed to establish a modus. On a reference or an issue, all the deeds would be ordered to be produced; and why should they not now be inquired into? This is a very different case from an application to inspect title-deeds. The plaintiff has a right to the benefit of any instrument in the possession of the defendant, which might make in his favor, such as, for instance, would show that he had the right, or that the defendant had not.

GRAHAM, Baron. A defendant has a right to charge a plaintiff, bringing an ejectment against him, with having no title, and to ask him *quo jure* he proceeds. If this demurrer had been more confined, the court might, to a certain extent, have protected the defendant, but they must also assist a plaintiff where he makes out a fair case for their interference, and the defendant cannot produce any reasonable objection to it in the mode of demurrer.

WOOD, Baron, absent.

[1] 1 Ves. sen. 87. [Before Lord Hardwicke, C., Aug. 10, 1747. "The bill was to have a discovery of the defendant's title by setting forth a settlement by which he claimed that his wife upon her marriage settled the premises to her separate use, and that he is her representative: the plaintiff alleging that, if that settlement was produced, it would appear that she was only tenant for life.

"To this discovery the defendant demurred, because the plaintiff does not claim under that settlement.

"LORD CHANCELLOR. As the plaintiff has made a title in contradiction to yours, he hath no right, generally speaking, to look into your titles; but the bill charging that by producing this deed it will appear that her title was only for life, you must give some answer to it, and not barely demur, and what you barely know or believe is not sufficient, but what it is by this settlement. You have not pleaded yourself a purchaser so as to cover that; but have demurred to the whole, and it must be overruled." — ED.]

[2] 1 Ves. sen 248. [Lord Hardwicke said: "The question comes to this, whether any person in possession of an estate, as tenant or otherwise, may not bring a bill to discover the title of a person bringing an ejectment against him, to have it set out, and see whether that title be not in some other. I am of opinion he may, to enable him to make a defence in ejectment, even considering him as a wrong-doer against everybody." — ED.]

GARROW, Baron. If a man chooses to become a litigant, he may surely be asked as to his consciousness of having not a shadow of title to the subject-matter of his claim, and that without infringing the sacred rule that titles are not to be wantonly raked up without good cause. *Demurrer overruled.*

GLEGG *v.* LEGH.

BEFORE SIR JOHN LEACH, V. C. MAY 12, 1819.

[*Reported in* 4 *Maddock*, 193.]

A BILL was filed in the Court of Exchequer by the defendant against the plaintiff for tithes, upon which the defendant filed a cross-bill in the Court of Chancery for a discovery of the plaintiff's title to the tithes, and whether he had not conveyed them away. To this latter bill the defendant put in an answer as to part of the bill, and a demurrer as to the rest, and the demurrer came on now to be argued.[1]

Mr. *Fonblanque*, Mr. *Bell*, and Mr. *Spence*, in support of demurrer. In this case the defendant has answered part of the bill, and demurred as to the rest. A similar cross-bill was filed in the Exchequer against the defendant by another person of whom he claimed tithe, to which there was a demurrer, and it was overruled. That case is not reported.[2] The pleadings were exactly the same; this bill is but a transcript of that.

Mr. *Agar* and Mr. *Duckworth*, in support of the bill. In that case the demurrer admitted the facts stated in the bill; one fact stated being that the right to the tithes was in another person, which, if admitted by answer, would entitle the plaintiff to relief. On that ground the demurrer was overruled.

Mr. *Fonblanque*. This being a cross-bill, it ought to have been filed in the Court of Exchequer, where the original bill was filed.[3]

[1] The original report gives the demurrer *verbatim*, but as it occupies ten pages, setting out in all their prolixity the parts of the bill to which it applies, it is believed that it would only incumber the case to include it here. It is proper to add that it is confined entirely to the interrogating part of the bill, and concludes with assigning for cause of demurrer "that the said complainant hath not by his said bill made such a case as entitles him, in a court of equity, to any discovery from this defendant as to the matters hereinbefore specified, or any of such matters." — ED.

[2] Since reported in 6 Price, 88. — ED.

[3] But see, *contra*, Parker v. Leigh, 6 Madd. 115. — ED.

The VICE-CHANCELLOR. There may be weight in that objection. But have you not waived it by answering part of the bill?

Mr. *Fonblanque.* Supposing that, having answered the cross-bill, we are too late in the objection as to its being filed in this court, the question is, whether the defendant in the original bill is entitled by a cross-bill to ask a discovery of the title of the plaintiff in the original bill? The plaintiff, in that bill, is bound to prove his right to tithe; can you, then, by a cross-bill, oblige him to discover it? The plaintiff does not pretend an exemption from tithes; he must pay them to somebody. If different persons claimed the tithes of him, he might file a bill of interpleader. The plaintiff states in his bill that the defendant has documentary evidence in his possession. Is the defendant to look through all his title-deeds to see if there is any flaw in his title? Lord Redesdale says, "In general, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims."[1]

The VICE-CHANCELLOR. Suppose the cross-bill had charged that in January, 1800, the defendant conveyed this portion of the tithes to A. B., must not the defendant answer that allegation? The bill here generally alleges there has been a severance of the title to the tithes from the rectory, and that the defendant has made a conveyance of these tithes.

Mr. *Fonblanque.* We should have had no objection to answer such a question; but here the inquiry, as to the severance, extends to the earliest times.

In Parker *v.* Legh the same point as this was before your Honor, on a cross-bill filed by another of the defendants to the original bill, and your Honor allowed the demurrer.

Mr. *Agar* and Mr. *Spence*, in support of the demurrer. There are several defendants to the original bill filed by the defendant in the Exchequer. Only three of them have filed cross-bills. One of these cross-bills was filed in the Court of Exchequer, and the demurrer was overruled on the ground stated; another, Parker *v.* Legh, was filed in this court, and the demurrer was allowed by your Honor; the present is the third cross-bill filed, and the propriety of the demurrer to this bill is now to be considered.

If a rector files a bill for tithes, he is bound on a cross-bill to discover whether he has any papers in his possession which show that he has no title to the tithes. In Stroud *v.* Deacon,[2] that doctrine was laid down on a demurrer to a bill for the discovery of a settlement. In Selby *v.* Selby,[3] an ejectment was brought, and a bill was filed for a discovery

[1] Redes. Tr. Pl. 154, 155, 3d ed.

[2] 1 Ves. sen. 37.

[3] 4 Bro. C. C. 11.

of the plaintiff's pedigree, and allowed. A discovery as to a case stated for the opinion of counsel has been compelled.[1]

The VICE-CHANCELLOR. A defendant is not protected from answering as to his own admissions of facts, although they were contained in a case stated by him for the opinion of counsel.

Mr. *Agar*. It is said the defendant must show a title in the original bill; but the answer to that is, that he may show a *prima facie* title, at the same time that he has a deed in his possession destructive of his title. If a vicar files a bill for tithes, a cross-bill may be filed for the discovery of papers in his possession, which may show that the rector is entitled to the tithes. If, in this case, papers are produced, it will perhaps appear that there is an exemption from tithes. The difficulty the defendant raises as to the discovery of the deeds in his possession, raises a suspicion that he has papers which show he has no title to the tithes. Where a title is in litigation you may always call for a discovery. In Gardiner *v.* Mason,[2] a defendant referred to a letter which affected his title, and on motion the court ordered an inspection by the plaintiff.

The VICE-CHANCELLOR. I see by my note of the judgment in the case of Parker *v.* Legh that I expressed a clear opinion that the defendant was not bound to discover his title, or to set forth his title-deeds, or the contents of them, but that he would have been bound to answer to a charge that he had conveyed away the tithes. If, therefore, that bill contained such a charge, it is singular that this observation on the part of the court did not bring it to the attention of counsel. I cannot allow this demurrer; but let the defendant be at liberty to amend his demurrer, and to confine it, if he pleases, to the discovery of title, and let the plaintiff be at liberty also to amend his bill.[3]

[1] *Vide* Stanhope *v.* Roberts, 2 Atk. 214. [2] 4 Bro. C. C. 479.

[3] It appearing that there was in fact, in Parker *v.* Legh, a charge that the defendant had conveyed away the tithes, it was agreed that the same order should be made there as in this case.

BLIGH *v.* BENSON.

IN THE EXCHEQUER. MAY 1, 1819.

[*Reported in* 7 *Price*, 205.]

BLIGH moved that the defendant in this bill (which was a suit for tithes) might be ordered to produce and leave in the hands of his clerk in court a book made and kept by a former rector of the parish, relating to the tithes of the parish, then in the possession, power, or custody of the defendant.

He stated that he founded this motion on an admission in the defendant's answer, that the book now required to be produced was in the custody of the defendant's attorney, and related to the matter in issue, and that it would furnish evidence in favor of the plaintiff; and he read the following passage (which was in answer to an interrogatory whether the book was not in the custody of the defendant, and whether, in substance, it would not appear therefrom that the pretended modus was in fact only a part of a general composition, contributory amongst the whole parish) as making such admission: "He (the defendant) hath been informed, &c., that a certain book relating to the tithes of the parish of Romaldkirk, which was kept by Dr. Browell, who was formerly rector of the said parish, was produced by the defendant's attorney, but not by the defendant, at the trial in the said amended bill and former answers of the defendant mentioned; and that it was so produced with the view of proving that the modus or ancient customary payment of twelve shillings and ninepence in and by the former answers of the defendant insisted upon with respect to the farm or lands called Doe Park, in the occupation of the defendant, was a good and valid modus, or ancient customary payment, covering tithe of agistment and all prædial tithes in respect of the said farm or lands;" and he denied that the book was or ever had been in his possession. In a subsequent part of the amended answer, the defendant stated that he had been informed and believed that there were in the said book entries of divers sums under the denomination of tithe farm, but did not know if such sums amounted to the sum stated by the plaintiff as being the composition, but that *if* there were such

entries, and *if* they were of such amount, yet the defendant insisted that the validity of the modus did not depend upon any other payments for any other part of the parish. Upon those passages it was submitted to the court that the plaintiff was entitled to the production of the book by the defendant, the possession of his attorney being his possession, and was subject to his control: Wright *v.* Mayer;[1] Fenwick *v.* Reed;[2] and that the subsequent admissions in the answer showed that the book contained matters favorable to the plaintiff's case. And it was further contended that the book itself was not, from the nature of it, such a document as the defendant was entitled to the exclusive possession of, or to give in evidence on his own behalf only.

Lovat was to have opposed the motion, but the court did not require to hear him.

The Lord Chief Baron. This book is part of the defendant's evidence, and the rule is clear that you have no right to call upon your opponent in this way to expose his case to his adversary. It would be opening a wide door to perjury. Besides, you must show in all cases of an application for production of papers that they would be evidence making in your favor: and that must be shown by admissions in the defendant's answer. Now here there is nothing like an admission even under the "if," that the book when produced would assist the plaintiff's case.

The court therefore refused the application.

Lovat then applied for costs, which the court refused, the Chief Baron giving as the reason that the application was not without some color; for although the court would not compel a defendant on a bill for discovery to disclose his evidence, yet it was also a rule that, when the plaintiff could show that the defendant was in possession of evidence which might serve him, if produced, it would be against conscience to allow him to withhold it; that here it had been shown that the defendant possessed a book (for the possession of the attorney was under the control of the defendant) which, in great probability at least, might have contained evidence favorable to the plaintiff's case, although it was not sufficiently admitted by the answer to authorize the court to grant the application. *Motion refused without costs.*

[1] 6 Ves. 281. [2] 1 Mer. 128.

VANSITTART *v.* BARBER.

BEFORE RICHARDS, C. B. NOVEMBER 17, 1821.

[*Reported in* 9 *Price*, 641.]

STEPHEN, on the part of the plaintiff, moved for an order on the defendant, calling upon him for the production of deeds, books, bills, papers, &c., admitted by him in his answer to the bill to be in his possession.

Cooper opposed the motion, on the ground that the plaintiff had not made out such a case by his bill as entitled him to call on the defendant to produce his documents; but he did not oppose the application as far as it sought the production of the letters forming a correspondence between the parties.

Stephen insisted that he was entitled, on what was brought before the court by the bill and answer, to the order, and urged that according to the practice of the Court of Chancery the defendant could only protect himself from the application by plea stating facts; and he mentioned a recent case before the Vice-Chancellor to that effect.

RICHARDS, Chief Baron. During a very long course of practice in the Court of Chancery, I have never known the production of documents ordered, but on a very strong case of unanswerable equity; and I remember the time when that court required so satisfactory a case to be made out as seldom to make the order. The defendant, the owner of the documents, never can be called on to give any reason why he should not produce them, for all must depend on the plaintiff's ground of application, and the defendant needs no other protection than the jealousy of the court. If it be the modern practice of any part of the Court of Chancery to require the defendant to protect himself by plea, I will never consent to the introduction of such a practice into the Exchequer. It is a doctrine of the greatest moment to titles that a party should not be compellable to produce his securities. What would otherwise become of our property? There is no case made in this instance; but let the order be made as far as the party consents, and let the minute notice the consent.

Ordered (by consent) as to the correspondence.

LINGEN v. SIMPSON.

BEFORE SIR JOHN LEACH, V. C. DECEMBER 14, 1821.

[*Reported in* 6 *Maddock*, 290.]

A MOTION was made on behalf of the plaintiff that, without prejudice to any exceptions the plaintiff might be advised to file to the answer of the defendant, the defendant might in a week leave with his clerk in court the Reference Book No. 2, admitted by his answer in this cause to be in his custody, with liberty for the plaintiff, his clerk or agents, to inspect or refer to the same for the purpose of the said plaintiff's trade; or that the same might be deposited in the hands of a third person in the town of Birmingham, for the joint use of the plaintiff and defendant, with liberty for the plaintiff, his clerk or agents, to inspect the same for the purposes of the plaintiff's trade; or that the said book might be restored to the possession of the plaintiff, with liberty for the defendant to inspect and refer to the same as the court shall direct.

Mr. *Hart*, in support of the motion, cited Nutbrown *v.* Thornton [1] and Fells *v.* Read.[2]

Mr. *Bell* and Mr. *Cooper*, for the defendant. The whole object of the suit and prayer of the bill are that the plaintiff might be declared entitled to a copy of this book for the purposes of his trade.

The VICE-CHANCELLOR refused the motion, stating that the court made interlocutory orders for production only upon two principles,—security pending litigation, and discovery for the purposes of the suit; and that the present application sought an anticipated decree.

[1] 10 Ves. 159. [2] 8 Ves. 70.

HARRIS *v.* BODENHAM AND OTHERS.

BEFORE SIR JOHN LEACH, V. C. MARCH 18, 1823.

[*Reported in* 1 *Simons & Stuart*, 288.]

CERTAIN letters and other documents had been deposited by the defendants, Garrett, Shaw, and Hornyhold, with their respective clerks in court, under the usual order which had been obtained by the plaintiffs for that purpose.

Mr. *Pemberton*, for the plaintiff, had moved on a former day that these letters and documents might be delivered over to the plaintiff's clerk in court, and be by him produced at the joint expense of the plaintiff and the defendant Garrett, and given in evidence for either party at the ensuing assizes for the county of Hereford in the action there depending between them.

Mr. *Roupell*, for the defendant Hornyhold and his clerk in court, opposed the motion, and said that the clerks in court were responsible for the safe custody of all the documents deposited with them, and were entitled to all fees accruing from the inspecting or copying of them, and also to attend with them in court or elsewhere as might be required, and that no instance had ever occurred where the court had taken the documents belonging to one party and placed them in the hands of his adversary, or of his adversary's clerk in court.

The VICE-CHANCELLOR ordered the motion to stand over that he might inquire into the practice. And on this day he said that he had received a certificate from the clerks in court, which was as follows: —

"We do certify that in all cases where exhibits are left under an order in the hands of the clerk in court for a plaintiff or defendant, and it has become necessary to have those exhibits produced in court or at the assizes, it is and ever has been the invariable practice that the clerk in court in whose custody they are so deposited, or some person authorized by and acting for him, and no other person, should attend therewith, upon payment of his fees and expenses. And we know of no instance where exhibits have been ordered to be delivered up for the aforesaid purpose to any other person, unless by the consent of all parties, and upon payment of the clerk in court's fees."

His Honor observed that this certificate was a very strong one, and that he must hold the practice to be as stated in it.

 Motion refused.

FIRKINS v. LOWE, Clerk, and LOWE, Clerk, v. FIRKINS.

In the Exchequer. February 11, 1824.

[*Reported in M'Cleland*, 78.]

The defendant in the original bill, in his answer thereto, set up a modus of 17*s.* in respect of the small tithes of two farms, Green Street and Topstile. In his cross-bill he stated that the vicar had in his possession, &c., divers vicars' books, and books of account, papers, &c., from whence it appeared that the sum of 17*s.* had been for a number of years back paid by the occupiers of the farms aforesaid in lieu and satisfaction of all small tithes arising thereon; charged that those books, &c., had come into the vicar's hands in his corporate capacity; and submitted that the same ought now to be produced for his information.

The vicar, in his answer, admitted that he had in his possession certain books whereby it appeared that the sum of 17*s.*, in distinct sums of 10*s.* for Green Street and 7*s.* for Topstile, as a yearly payment or composition for the small tithes of the same farms and lands from the occupiers thereof, was paid to, and accepted by, two former vicars, in nine former years therein mentioned, in lieu of all small tithes which arose yearly from the said farms and lands. He stated that in a schedule annexed to his answer he had set forth "a full and true list and description of all books, memorandums, documents, papers, and writings in his custody or power relating to the tithes of the said parish, or to any payment or payments in lieu of tithes, or to any of the matters or things in the said bill inquired after, distinguishing which of such documents and writings related to the payment of 17*s.* by the occupiers," and alleged that the last-mentioned documents contained various entries and matters of importance to defendant, but in which complainant had no sort of concern. He denied that the books, &c., had come to him in his corporate capacity, and submitted that he ought not to produce them.[1]

[1] He also stated that he withheld the books as being, so far as they concerned the matter in dispute, evidence for him and not for the plaintiff, and as being his own private property, and for the most part not concerning the plaintiff. See 18 Price, 194. — Ed.

This day it was moved on the part of the plaintiff in the cross-suit that the defendant might, within four days, produce and leave in the hands of his clerk in court the several books, papers, and writings mentioned and referred to in the schedule to his answer annexed; and that the plaintiff, his solicitors or agents, might be at liberty to inspect the same, and take extracts or copies thereof, or such parts thereof as he might be advised; and that publication of the depositions of the witnesses taken in the original cause might be further[1] enlarged for one month after such production.

Martin, *H.*, and *Sclater*, in support of the motion, urged that it was a very common proceeding in equity in the course of a cause to allege that one party possessed papers from which the title of the other might be made out, and to require the production of them. And the rule was this: the court would make an order to that effect if the document did not constitute the title of the party in whose power it was; in that case they would not compel him to produce it, and thereby destroy his own title. But vicars' books did not constitute the title of the vicar. The books were evidence against the occupier, and it would be against conscience to suffer them to be withheld when they would operate to his benefit by showing what payments, and at what times, had been made by former occupiers of these farms in lieu of the small tithes. The alleged customary payment of 17*s.* had been in effect admitted by the vicar through a number of years, and the evidence of its extent was contained in the documents called for. The books were either of a public or a private nature; if the former, they were evidence for both sides; if the latter, the plaintiff had such an interest in them as to entitle him to demand an inspection. Smith *v.* The Duke of Northumberland.[2]

In Bligh *v.* Benson[3] an application of this nature had been refused; but it was because it did not appear that the evidence sought would make in favor of the party; and the late Lord Chief Baron said there that "it was a rule that when the plaintiff could show that the defendant was in possession of evidence which might serve him, if produced, it would be against conscience to allow him to withhold it." The enlarging publication would cause no delay, because the original cause stood in the paper for hearing forty-nine from the top.

Simpkinson and *Ellison*, contra, insisted that the motion was multifarious, and ought to be refused on that ground. Without asserting that vicars' books should be withheld in all cases, here there was very sufficient reason for refusing an inspection of them, because it was not established that they contained evidence which would assist the plain-

[1] It had already been twice enlarged. See M'Cleland, 10. — Ed.
[2] 1 Cox, 368. [3] 7 Price, 205.

tiff's case. Vicars' books were not public documents. Though generally there might be something anomalous in them, here, from the nature of their contents, as sworn to by the vicar, they must be taken to be the private books of the holder, and there was no pretence to demand an inspection of them. No case was cited where a vicar had been called upon to produce his books. An application for books of this description by the rector had been refused in Bligh *v.* Benson; and that was confirmed by Brazier *v.* Mytton, last term, where the court also refused the production of certain documents in the hands of an occupier moved for by a rector. They opposed the latter part of the motion, on the ground that it would be productive of further unreasonable delay, observing that there were two lists of causes, one, of those in which publication had, the other, of those in which publication had not, passed.

Martin, H., in reply, allowed that it might be an objection to a bill that it was multifarious; but two things might be prayed in one motion by way of saving time and expense. [HULLOCK, B. That is no objection, if they are not incompatible.] The documents were partly of a private, partly of a public nature; for if the present possessor were dead, or promoted, they would be transmissible to his successor.

ALEXANDER, C. B. I very much incline to grant this application. It appears from the cross-bill and answer that the vicar has in his possession a great number of papers and writings which relate to the subject-matter of the suit. It is the constant practice of courts of equity to compel a party in such circumstances to produce evidence against himself. I don't say the rule is universal, though it is very general. There are certainly exceptions to it. One of the exceptions is when the documents relate to the title to real estate; in which case a court of equity will not enforce a production, unless the party seeking it has an interest in the particular instrument he requires to be produced. If I understand any part of the justice of this country as administered in courts of equity, I must find out that the subject-matter of this motion constitutes one of the exceptions, before I refuse the application of the general rule. I do not find that any such exception has been established. It is stated that the books in question here are private books; that they are the books of the vicar. It does not occur to me that this distinction makes any difference. It seems the books are of both descriptions. I do not find this an exception to the rule which compels a party to give evidence against himself; but I certainly think that the particular books of which an inspection is required should be specifically pointed out, and the order limited to them. With respect to the enlarging publication, I think both parties here have been guilty of some delay. One party has been a long time in suing out

and executing his commission;[1] the other very late in filing his cross-bill. The only question is, whether, in further enlarging publication, I should do any mischief to either. And it appears to me that from the state of the paper, and the state of these proceedings, I should do no mischief whatever. In granting this motion, therefore, I do on the one point what the law of the country entitles the party to; and I do in the other no harm whatever. But it appears to me to be according to the rule respecting costs on cross-bills for discovery that the party making the application should pay the costs.

GRAHAM, B. We are only to consider what is the effect of a bill of discovery. Most unquestionably a bill of discovery entitles the party filing it to some information from his adversary; and it is a rule that he has a right to the production of such documents as make for his side. The vicar admits that he has in his possession books containing entries having reference to a modus. But his admission is no discovery to the occupier, if he must submit to the construction put on the entries by the other party. The moment the vicar admits that he has papers relating to the matter disputed, it is in the power of the court to call for full disclosures of them, that it may put its own construction upon them. This is a branch of the common jurisdiction of the court when once a party can put his finger on any documents which assist his case. But here the party must name the specific documents.

GARROW, B. The question is one of very considerable importance. From the best consideration I can give it, I am of opinion that these books ought to be produced. I allude to those which speak of what the plaintiff in his bill of discovery charges to be material to his case. I think nothing of the vicar saying that it is not material. The enforcing a production of such documents appears to be quite agreea ble to the principles which are acted on in a court of equity.

HULLOCK, B. With the information which I possess at this moment, without any authority to guide me, without any case being cited to show that what is sought here has ever been granted, referring only to general principles, I must say that I do not concur in the opinions expressed by my learned brothers. I may be wrong, but I have heard no argument which would warrant me in arriving at another conclusion. It seems to be a case which would constantly occur, that in a suit for tithes a vicar's book would be evidence for his adversary. No case has been cited where the point occurs; no authority produced; but we are left entirely to general principles. The question is not whether a person may be obliged to give evidence against himself; that, both in law and equity, is the law of the country, except in two cases; except this would render him liable to penalties or a forfeiture. But

[1] To examine witnesses. See M'Cleland, 10. — ED.

the question is, whether a party to a suit be compellable to afford an inspection of his own private books to enable his adversary to find out evidence against him. I always understood that he was not; and in a case a term or two ago I concurred with the rest of the court in refusing to compel a party to produce a private document. Bligh *v.* Benson is very like the present case, except that the parties are changed. There the plaintiff, who was a rector, filed a bill in this court for tithes, charging that a book, made and kept by a deceased rector, and relating to the tithes of the parish, had come into the power of the defendant, who was an occupier. He did not contradict the charge, and therefore the rector applied to the court to have it produced. If books of this description are of that doubtful nature, why was not that ordered to be produced? But the Chief Baron refused the application. If these books are of a private nature, the vicar ought not to be obliged to produce them against himself. The object is to search them for evidence for the other side. Feeling, as I do, not sufficiently satisfied in my own mind with the arguments or reasoning advanced in support of this motion, I have not come to that conclusion that the books should be produced. But I defer to the opinion of the court, and I think no injustice can be done on this occasion. The order ought to be restricted to such books, papers, or writings as relate to the subject of the bill.

GRAHAM, B. I certainly don't recollect any particular instance in which books belonging to a late vicar have been taken out of the hands of the present one.

The order was drawn up in the following terms: The entries in the vicars' books to be produced, so far as they relate to a payment of 17*s.*; those entries to be inspected at the office of the solicitor in the country.[1] Publication to be enlarged for a month, but the cause to stand in the paper of causes as if publication had passed. The costs to be paid by the plaintiff.

[1] "It is ordered by the court that the said Thomas Hill Lowe do permit and suffer the said William Firkins, his solicitors or agents, on reasonable notice and at all reasonable times, at the office of the solicitor for the said Thomas Hill Lowe, to inspect all entries in the several books, papers, and writings, mentioned and referred to in the answer of the said defendant to the said cross-bill and the schedule thereto, which relate solely to the payment of the sum of 17*s.*, or of the sums of 10*s.* and 7*s.*, making together the sum of 17*s.*, alleged by the said William Firkins to be paid as a modus for the several farms called Green Street and Topstile in the pleadings of these causes mentioned, and to take copies or extracts therefrom at the expense of the said William Firkins, as he shall be advised; the said Thomas Hill Lowe, the defendant in the said cross-bill, making an affidavit that the entries so ordered to be inspected as aforesaid contain all the entries in the said books, papers, and writings which relate to the said payments for the farms called Green Street and Topstile aforesaid." See 18 Price, 206. — ED.

WILSON AND OTHERS v. FORSTER AND OTHERS.

IN THE EXCHEQUER. APRIL 30, 1825.

[*Reported in M'Cleland & Younge, 274.*]

THIS (amended) bill was filed by the plaintiffs, as legatees, claiming under the will of John Forster, who had charged his estates in general terms with the payment of his legacies, for taking an account of the testator's personal estate, and such real estates as he had died seised of in fee-simple; and a decree had been made to that effect. An interrogatory had been exhibited for the further examination of the defendants, touching a settlement or deed relating to an estate of which the testator had died seised (in fee, according to the allegation of the plaintiffs), and referred to in former examinations of two of the defendants, who were trustees. The defendant Forster stated, by his examination in answer, that the instrument in question was in the hands of his solicitors, or their agent, and that it related to property of which he had some time before become tenant in tail, and had no relation to any property to which the testator had ever been entitled in fee-simple.

Maggison, for the plaintiffs, moved that the defendants, or the defendant Forster, might produce and leave the deed in the office of the Master to whom the cause stood referred; arguing that Forster, being but a farmer, was incompetent to describe the effect of the deed, and that if the legatees were obliged to take it upon his representation, they would be deprived of their legacies to the amount of £2000; which circumstance gave them a sufficient interest in the document to call for an inspection of it.

ALEXANDER, C. B. The question is, whether you have any cases to show that the court will compel a tenant in tail to produce the deed under which he claims, without showing a more direct interest in it.

Purvis, contra, contended that the application was contrary to all principle and authority, and said he could produce several cases in point, if the court thought it necessary.

ALEXANDER, C. B. The difficulty in the way of the application is the rule of the court. There is reason enough, but is there any author-

ity for the motion? The alleged hardship is one which happens in every case where a party desires to see deeds which constitute the title of the person who is called upon to produce them: he must take the effect of them on the oath of the individual who holds them.

Motion refused, with costs.[1]

WILSON v. FORSTER.

IN THE EXCHEQUER (LORD LYNDHURST, C. B.). FEBRUARY 26, 1831.

[*Reported in Younge*, 280.]

BILL, in the nature of a supplemental bill, by legatees entitled to legacies charged on real estates, against the heir-at-law of the testator, the defendant being also the heir-at-law and devisee of an executor and devisee in trust of the testator, which executor and trustee was also, in his lifetime, heir-at-law of the testator.

The bill stated the proceedings in a suit instituted by them in this court against the executors and devisees in trust of the will of the testator, in which the usual accounts of his personal estate, and of the estates of which he was seised in fee, were taken, and some part of the last-mentioned estates sold in aid of the personalty; but which, as the bill stated, did not produce sufficient to pay the legacies, and that the defendant had entered into the possession of the real estates of the testator, and refused to sell or concur in the sale thereof. The bill then referred to an allegation by the defendant's father (the executor and trustee) in the original suit, and by the defendant himself, that the only real estates of which the testator was seised in fee were the estates which had been sold; and that, though he died seised of other estates of considerable value, yet that he was only tenant in tail thereof; and that, on his decease, the last-mentioned estates descended to the defendant's father, and afterwards to the defendant, and were not subject to the debts or legacies of the testator. The bill charged that the plaintiffs had, since the decree in the original suit, discovered that the testator was not tenant in tail, but tenant in fee-simple, of the said estates or the greater part thereof; and that part of the said estates, in the year 1698, belonged to an ancestor of the testator, and was limited, by an indenture dated in that year, to

[1] The court intimated to the plaintiffs' counsel that he might come again, if he found any authority in favor of the application; but it was not renewed.

an ancestor of the testator for life, with remainder to his first and other sons in tail; and that the residue and greater part of the said last-mentioned estates was purchased or acquired by some ancestor of the testator subsequently to 1698, and was never limited in tail, but so that the testator took an estate in fee-simple. The bill charged that the defendant had in his possession the title-deeds and writings relating to the said estates, and particularly the settlement of 1698. And that if the defendant should persist in the allegation that the testator was tenant in tail of the said hereditaments, he ought to set forth the date, &c., of the deed or instrument by which such entail was created; and ought also to put into a box or bundle all the title-deeds, evidences, and writings relating to the said estate, in his possession or power, and produce and leave the same in the hands of his clerk in court for the usual purposes.

The defendant demurred to so much of the bill as required him to set forth whether the estates did not, in the year 1698, belong to an ancestor of the testator; and whether the same were not settled by an indenture dated in that year in the manner in the bill stated; and as to so much of the bill as called on the defendant to set forth the date of the deed by which the entail was created, and the parties thereto, and as required him to produce the title-deeds and writings. The defendant answered the remainder of the bill; and, by the answer, he denied that the plaintiffs had, since the decree, discovered, or that the fact was, that the testator was not tenant in tail of the estates mentioned in the bill, or that he was seised in fee-simple thereof, or of any part thereof.

Mr. *Purvis*, in support of the demurrer, contended that the plaintiffs did not by their bill show any title to the discovery sought by them, inasmuch as, if the entail stated by the bill had been created, the plaintiffs could have no interest in the estates. That the plaintiffs did not claim under the entail, but in opposition to it, and were not entitled to the production of the deed of entail for the purpose of showing what estates were comprised in it. Nor were they entitled to the other deeds, as they related to the defendant's title. And he cited Sampson *v.* Swettenham [1] and Compton *v.* Earl Grey.[2]

[1] 5 Madd. 16. [Before Sir John Leach, V. C., January 21, 1820. "Mr. Parker moved for the production of a deed referred to in the defendant's answer, upon which he founded his title.

"Mr. *Bell*, contra.

"The VICE-CHANCELLOR. The plaintiff is entitled to the production of a deed which sustains his title, but he has no right to the production of a deed which is not connected with his title, and which gives title to the defendant.

"*Motion refused.*" — ED.]

[2] 1 Younge & J. 154.

Mr. *Koe* and Mr. *Ching*, for the bill, contended that if the deed of 1698, creating the entail, were produced, it would appear that a small portion only of the estates was actually entailed; and that the plaintiffs were therefore, to a certain extent, interested in that deed, and entitled to the production of it as a means of showing that the other estates were not included in it; and that they were also entitled to the production of the other deeds. And they referred to Stroud *v.* Deacon,[1] Smith *v.* The Duke of Northumberland,[2] and Sanders *v.* King.[3] *The demurrer was allowed.*

[1] 1 Ves. 87.
[2] 1 Cox, 368.
[3] 6 Madd. 61. See also 2 Sim. & Stu. 277.

TYLER v. DRAYTON.

BEFORE SIR JOHN LEACH, V. C. MAY 2, 1825.

[*Reported in* 2 *Simons & Stuart*, 309.]

THE object of the bill was to set aside a sale and conveyance of certain estates made by Griffith Jenkins, deceased, the plaintiff's nephew, to the defendant, as having been obtained for an inadequate consideration, by taking advantage of the inexperience, imbecility of mind, and embarrassed circumstances of the vendor. The bill alleged that the plaintiff, on her nephew's decease, became entitled to these estates under the settlement on the marriage of her late father and mother, and charged that the defendant was in possession of that settlement, and of other deeds and documents relating to the estates and to the sale and conveyance to him, and required him to set forth a schedule thereof. The answer denied all the allegations of fraud in the bill. The schedule annexed to it set forth, as required by the bill, a list of the title-deeds, the settlement, and the defendant's purchase-deeds.

The plaintiff now moved for the production of all the deeds mentioned in the schedule, or such of them as the court should be of opinion that he was entitled to inspect.

The only deeds which the defendant objected to produce were the purchase-deeds.

Mr. *Agar*, Mr. *Sugden*, and Mr. *Farrar*, for the plaintiff, contended that the purchase-deeds ought to be produced, and cited Taylor *v.* Milner,[1] Beckford *v.* Wildman,[2] The Princess of Wales *v.* Lord Liverpool,[3] and Balch *v.* Symes,[4] and relied on the following passage of the judgment in the last case: "Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and no lien can protect the defendant from producing it; for it is the object of the suit that the deed may be declared a nullity." They added, that it was common in tithe bills to allege that deeds and other documents were in the possession of the defendant, from which it would appear that the plaintiff was entitled to tithes in kind.

[1] 11 Ves. 41.
[2] 16 Ves. 438.
[3] 1 Swanst. 114.
[4] Turn. & Russ. 87.

Mr. *Heald*, for the defendant, distinguished Taylor *v.* Milner and Beckford *v.* Wildman from the present case, saying that the motion in the former was for the production of letters only, and had nothing to do with deeds, and, in the latter, to have deeds impounded in the Master's office until the hearing; he added, that the court would never compel a production of deeds if the answer denied that the plaintiff had any title to the relief prayed by his bill; that here all the allegations of fraud, and, consequently, the whole equity of the plaintiff, were entirely denied; and that, if this motion were granted, a person who wanted to see a deed belonging to another for the purpose of picking a hole in it, would have nothing to do but to file a bill containing a fictitious case of fraud, and then to move for the production of the deed.

The VICE-CHANCELLOR said that where a defendant referred to his schedule as containing all deeds, papers, &c., in his custody or power relating to the matters in question, there the plaintiff was entitled to the inspection of all such deeds, papers, &c., as of course, unless it appeared, by the description of any particular instrument in the schedule, or by affidavit, that it was evidence, not of the title of the plaintiff, but of the defendant, or that the plaintiff had otherwise no interest in its production; and he ordered the defendant to produce all the deeds mentioned in the schedule, except the purchase-deeds.

COMPTON v. EARL GREY.

BEFORE ALEXANDER, C. B., AND GRAHAM, B. DECEMBER 12, 1826.

[*Reported in* 1 *Younge & Jervis*, 154.]

BILL by an impropriate rector against occupiers of lands for an account and satisfaction of tithes. To this bill Earl Grey, who was a portionist of the tithes, was made a defendant. The bill charged that Earl Grey was entitled to a portion of the tithes which were not demanded by the bill. The bill also charged that the tithes demanded by the bill had not been severed from the rectory, and that Lord Grey had in his custody, possession, or power divers deeds and writings, from which, if produced, it would so appear, and would prove the title of the plaintiff to the tithes demanded by him of the occupiers. The bill prayed an account and satisfaction of the tithes by the occupiers, and a discovery of the deeds or grant under which Lord Grey claimed; and by the bill the plaintiff offered to confirm such title as Lord Grey might on production of his deeds appear to have. Earl Grey demurred to so much of the bill as sought a discovery or production of the deeds, and answered to the remainder; and by his answer denied the plaintiff's title as rector, and stated that the parish consisted of several townships, which were named in the answer, and that at an early period, and before the Statute of Dissolutions, portions of the tithes had been severed and granted from the rectory. The defendant then stated that he claimed to be entitled under a grant to the tithes of the township of Learmouth.

Tinney, for the plaintiff. This may be compared to the case of a bill by an heir against a jointress for a discovery of the deed under which she claims jointure. Such a bill has been held to lie, provided the heir offer to confirm the jointure.[1] So here, though we seek a discovery of Lord Grey's title, it is not in order to impeach it, for we offer to confirm such title as he may appear to have. In this case the occupiers allege Lord Grey to be entitled to the tithe of hay, and intend to pay it to him. The plaintiff believes Lord Grey to be entitled to

[1] Lord Redesdale, 162.

the tithes of corn and grain, but not to the tithe of hay; and he therefore desires the production of those deeds which, though they establish Lord Grey's title to some articles, will evince the rector's right to the remainder. The title of Lord Grey is the title of the plaintiff. If Lord Grey had simply pleaded that he was entitled to all the tithes of Learmouth, he would have been bound to state that the tithes claimed by him had been severed from the rectory; he would have pleaded the grant of the portion as a bar to the discovery sought by the bill. It is apprehended that the tithes of corn and grain were granted to an ancestor of Lord Grey when the lands were arable, and though they are now all in pasture, he continues to receive the tithes without any title. If Lord Grey had only pleaded that he had a title, it would have been sufficient; but he protects himself from the discovery without setting up a title. The demurrer is also overruled by the answer. In the answer, he states that he claims to be entitled to all the tithes in Learmouth; first, demurring generally to the discovery, and then alleging that he is entitled to the tithes, without stating whether under the grant, or in what manner. Lord Grey alleges also that he has not any deeds in his possession which will make out the plaintiff's title, because he denies that the plaintiff is rector. But by the demurrer he admits the plaintiff to be rector, and therefore by inference that, if rector, the deeds are material.

Jervis and *Purvis*, in support of the demurrer. The case of the jointress does not apply; to support that case there must have been an admission of the plaintiff's title. In Wing *v.* Murrel [1] the court held the plaintiff to strict proof of his title. We deny that we are bound to make the discovery sought by the plaintiff's bill, but state by our answer, as we were bound to do, that these tithes were severed at a time prior to the commencement of the plaintiff's title.

Tinney, in reply. The court certainly will not compel a defendant to produce a deed where the plaintiff quarrels with that deed, and seeks to pick a hole in the title; but where he merely seeks a discovery of a deed to establish a collateral title, there can be no objection to its doing so.

Lord Chief Baron. This case involves a very important principle. In all the cases in which advantage has been sought to be taken of forfeitures and cases of that description, the general principle has been, that unless the party can show an interest in the realty he is not entitled to any discovery of the deeds relating to the estate. It is by a similar mode that the defendant endeavors to protect himself in this case; he contends that the plaintiff has not any title or interest in these tithes, and that therefore he is not entitled to any discovery of the

[1] M'Clel. & Younge, 620.

deeds relating to those tithes. It has been said that he should have protected himself from this discovery by a plea, and perhaps he might have done so; but I see no reason why, if the objection appears on the bill, a party may not avail himself of a defence which might be the subject of a plea in the shape of a demurrer. It does appear to me in this case that the objection is apparent on the face of the bill, and, therefore, that a demurrer was a good mode of defence.

It has been ingeniously said that the plaintiff has an interest in the deeds, but the same observation might be applied to almost every case. The effect of the argument is this: the plaintiff says, if you will produce your deeds it will appear that you have no title, and, as you have no title, I of necessity must have. This is carrying the argument very far; but it is put wholly out of question by the answer in support of the demurrer. The plaintiff says, I am the impropriate rector, and, if you have not a grant, I am entitled by the common law to the tithes of these lands. The answer, however, puts this in issue, for it denies that the plaintiff is rector, and therefore in effect says, that if the defendant is not entitled to the tithes, still the plaintiff is not entitled to them.

It has been said that the demurrer is overruled by the answer. This frequently happens from the draftsman incautiously answering the case covered by the demurrer; and the question is, whether that has occurred in this case? The demurrer is to the discovery of the deeds under which the defendant claims title to the portion of tithes. It is not clear to me that an admission that grants had in former times been made of these tithes amounts to an admission of title. The defendant admits generally that there have been grants, but says I will not disclose to you my title under those grants. It does not appear to me to touch the principle of those cases in which it has been decided that an answer to a fact previously demurred to overrules the demurrer. The defendant then denies that he has any deeds in his hands which will show the plaintiff's title.

I really am not able to see how this can be construed into an admission of the plaintiff's title, or as overruling the demurrer to the discovery. I think, therefore, that this defence is precisely within the rule, that a party not having an interest in the realty is not entitled to the production of the deeds.

GRAHAM, B. I entirely concur in the judgment of the Lord Chief Baron. It is a very general principle in a court of equity that a person shall not be compelled to produce his title-deeds to gratify the curiosity of a person having no estate or interest in the property to which they relate. In this case there is no privity between the parties; their titles are perfectly independent of each other; they may be coeval, perhaps

paramount even. It is clear that a portion of tithes may have had its origin before the Statute of Dissolutions. On the dissolution of monasteries, their possession became vested in the crown as a lay fee, and the crown subsequently granted them out in parcels. It was so probably in this case. Lord Grey has not told us how he claims to be entitled to these tithes, but it is most likely under such a grant as I have adverted to. Lord Grey says, I claim tithes of a particular description of certain lands, but what particular interest, or under what particular deeds I claim, you as a stranger are not entitled to ask, and I am not bound to discover.

It seems to me material in this case that the discovery sought by the plaintiff's bill is not confined to one particular deed, but extends to all the defendant's title-deeds. If the plaintiff had specified one particular grant, by which some portion of tithes had been granted or reserved to him, there might have been some difficulty, for he would have shown some sort of interest. But a man's title may depend on deeds for generations, and if one deed were produced, the plaintiff might say another deed would explain that, and show his title, and so on, and there would be no end to the discovery. Under these circumstances, it appears to me that the plaintiff has not sustained his case. With respect to the suggestion that the demurrer is overruled by the answer, I think there is no foundation for the objection. It appears to me that the plaintiff has clearly no right to the discovery sought by his bill. *Demurrer allowed.*

COLLINS *v.* GRESLEY, BART., AND OTHERS.

BEFORE SIR WILLIAM ALEXANDER, C. B. JUNE 30, 1828.

[*Reported in* 2 *Younge & Jervis*, 490.]

MR. ROUPELL moved for the production of papers admitted by the answer of the defendant, Sir R. Gresley, to be in his possession or power, and of which he had set forth a list or schedule in his answer.

The bill was filed by a vicar against occupiers, — the defendant, Sir R. Gresley, though made a defendant as an occupier, being also the owner of great part of the lands in the parish, and likewise the lay impropriator. The bill had charged in general terms that the defendants had various deeds, books, papers, writings, &c., in their custody, possession, or power, relating to the tithes and to the matters and things in the bill mentioned.

The defendant, Sir Roger Gresley, in compliance with a requisition of the bill, had set forth a schedule of all deeds, &c., in his possession. And, by his answer, stated that the deeds, &c., in the first part of the schedule were the evidences of the defendant's title to the impropriato rectory and tithes, and the same would not, nor would any of them, afford any evidence of the title of the plaintiff to the tithes and agistment claimed by his bill. And the defendant submitted whether the papers and writings in the second part of the schedule[1] were of such a nature as the defendant ought to be compelled to produce them, even though the same might be considered as relating to the title of the plaintiff to the tithes claimed by his bill.

In support of the motion, Mr. *Roupell* urged that as the plaintiff must have become entitled under an endowment to tithes which formerly belonged to the rector, he in fact claimed under the same title. And he compared the present case to that of an heir-at-law, or in tail, seeking relief against an alleged will or recovery of his ancestor.

Mr. *Spence*, for the defendant, Sir R. Gresley, opposed the motion, on the ground that most of the documents contained in the schedule did not relate to the plaintiff's title, and he had no interest in them,

[1] These were chiefly copies of terriers and matters of record.

some of them being grants and conveyances of the great tithes; that the remainder of the documents were copies of records which could be obtained by the plaintiff.

Lord Chief Baron. This is a very important question. There can be no doubt that, according to the general practice of the court, a defendant is bound to produce all papers and writings in his custody relating to the matters in dispute, though they may in fact make against him; but there has always been a limitation to that rule with respect to title-deeds relating to the inheritance: as to these I have always understood that one party is not bound to give the other party an opportunity of examining his title-deeds, though, as to this, there is again a distinction where the party has an interest in the deeds. I am therefore disposed to draw a distinction between those which relate expressly to the title of Sir Roger Gresley, and those which are collateral to his title. As to the case of an heir-at-law seeking a remedy against a will or recovery, the heir-at-law, showing a *prima facie* title, has a right to the production of the anterior title, but not to the subsequent title.

The plaintiff in this case does not claim under the defendant, but against him. *Motion refused, with costs.*

NAPIER v. STAPLES.

BEFORE SIR ANTHONY HART, LORD CHANCELLOR OF IRELAND.
NOVEMBER 29, 1828.

[*Reported in* 2 *Molloy*, 270.]

MR. MARTLEY, for the plaintiff, moved that the defendant may bring into the Master's office his banker's book, from a time specified in the notice. The account is pending before the Master, and there is a general direction to produce all books, &c. The rents of the trust estate were mixed with defendant's private moneys at his banker's. He has exhibited certain folios in his banker's book, but refuses to disclose the rest. On a personal interrogatory he swears that no other items relating to the matter of the account in this cause but those disclosed are entered in that book. The question is, if the account-book ought not to be open to inspection throughout?

This not being a kind of fact which the Master certifies, the point is brought before the court upon affidavit. Earl Salisbury *v.* Cecil.[1]

The LORD CHANCELLOR. The course is, to take a warrant calling on defendant to produce the accounts, and leave them in the office. The decree gives the plaintiff a right to inspection of all papers and books of account relating to the matter of the account decreed. But if the defendant produces a book in which different accounts are bound up together, all plaintiff is entitled to is, that so much of that book of accounts shall be disclosed as has reference to the matters in the cause. The defendant has a right to say this book contains this account, and other accounts also. I give in on oath the pages in which is contained whatever pertains to this subject, and I seal up the rest. The plaintiff has a right to see the identical account: but every line that defendant swears is not relating to it, he may shut out; and there can be no inquiry.

The order directing the production of the accounts, requiring them to be shown, not in a copy, but in the original book of the entries, must often lead to the production of books containing other matters.

[1] 1 Cox, 277.

In Purcell v. M'Namara,[1] I remember this point was debated. It was the plaintiff's object there to get at the original account as extensively as possible. The defendant produced a book sealed up, except one page, in which page he swore that all was contained that was in that book pertaining to the case. But on the examination of that page, being counsel for the plaintiff, I discovered a reference in it to an anterior folio. That was obviously evidence of the contents of that folio having relation to the same matter as the one exhibited. I moved to compel a further disclosure, but Lord Eldon would not allow me to go beyond the page; and he said the court has jurisdiction only over the conscience of the defendant, and whatever his own belief might be in that instance, he could not go further. The party's oath is conclusive.

Let said defendant, on oath, produce in the Master's office so much and such parts of his accounts with the bank of Latouche & Co. for the said period as relates to the subject-matter in question in this cause, and now in his possession.

[1] "The following case, which the writer received from a late Lord Chancellor of Ireland [Sir Anthony Hart], strongly illustrates the weight given to the oath of a defendant upon an interlocutory proceeding for the production of documents. In Purcell v. Macnamara, the defendant was ordered to produce certain account-books, with liberty to seal up such parts as he should upon oath declare related to private matters other than those mentioned in the bill. The defendant did accordingly seal up certain parts of his books under the liberty reserved to him by the order, and in this state they were produced. In the index at the end of one of the books was contained a reference to a page in the sealed parts of the book, which showed, if the index were correct, that the page referred to related to the matters in the bill. Upon this being discovered, the plaintiff applied to the court for liberty to break the seals; but Lord Eldon refused the motion, upon the ground that the answer concluded the question." Wigram on Discovery (2d ed.), p. 240. — Ed.

TOMLINSON *v.* LYMER.

BEFORE SIR LANCELOT SHADWELL, V. C. FEBRUARY 12, AND MARCH 2, 1829.

[*Reported in* 2 *Simons*, 489.]

THIS was a suit for tithes of hay, milk, calves, and agistment. The defendants in their answers admitted that they had in their custody several receipts for moduses and compositions given to them by the plaintiff and his predecessors, but submitted that they ought not to be compelled to produce them, inasmuch as some of the receipts were given for compositions for tithes of corn (which were not claimed by the bill), and the others were evidence for the defendants, and not for the plaintiff.

Mr. *Rolfe*, for the plaintiff, now moved that the defendants might be ordered to produce the receipts. He said that it was material to the plaintiff to inspect them, as it might appear from them that the alleged moduses had varied, or that some of the tithable articles which were stated to be covered by the moduses were not in fact included in them. He cited Evans *v.* Richard;[1] Corbett *v.* Hawkins.[2]

Mr. *Spence*, for the defendants, said that the plaintiff could not be entitled to have the receipts in question produced, as they were the defendants' evidence, and because they were given by the plaintiff, and therefore could not be admitted as evidence for him. He referred to Bligh *v.* Benson[3] and Firkins *v.* Lowe.[4]

The VICE-CHANCELLOR. As to those receipts which were given for compositions for tithes of corn, the plaintiff can have no right to see them, as they relate to matters not in dispute; and as to those that do relate to the matters in dispute, on the authority of Bligh *v.* Benson and Firkins *v.* Lowe, I shall make no order.

[1] 1 Swanst. 7.
[2] 1 Younge & Jer. 421.
[3] 7 Price, 205.
[4] 13 Price, 198.

THE ATTORNEY-GENERAL v. ELLISON.

BEFORE SIR LANCELOT SHADWELL, V. C. FEBRUARY 17, 1831.

[*Reported in* 4 *Simons*, 288.]

BY an act of Parliament passed in the reign of Charles the Second, for cleansing and improving the navigation of a certain river or navigable channel in Lincolnshire, called Fossdike, the corporation of Lincoln were empowered to undertake the work, in case they thought proper so to do, and the undertakers were empowered to demand such tolls from persons using the navigation as should be assessed and appointed by the commissioners named in the act.

On the 4th of October, 1671, the corporation of Lincoln became the undertakers of the work; and on the 10th of the same month the commissioners appointed the tolls to be taken by them. In September, 1740, the navigation being out of repair, the corporation demised two-thirds of the navigation and tolls to Richard Ellison, of Thorne, for 999 years, at the rent of £50 per annum, and Ellison covenanted with the corporation to repair and maintain the navigation; and the corporation covenanted that the tolls should not be reduced at any time during the term, without Ellison's consent. By an indenture of the 1st of August, 1741, the corporation demised the remaining one-third of the tolls to Ellison for 999 years, at the rent of £25, and subject to the like covenants as were contained in the former lease.

Ellison died in 1743, and, upon his death, Richard Ellison, his son, became entitled to the leases. Richard Ellison, the son, died in 1792; and, under the dispositions contained in his will, the two terms of 999 years became vested in the defendant, Henry Ellison, for life, with remainder to his eldest son, the defendant, Richard Ellison, absolutely.

The information was filed against Henry Ellison and Richard his son, the corporation of Lincoln, the acting commissioners under the act, and certain other persons. It charged that the leases were not warranted by the act, and were therefore void; that the defendant Henry Ellison had in his custody various deeds, &c., relating to the

matters therein mentioned, and it prayed that the leases might be set aside.

Henry Ellison, in the schedule to his further answer, set forth a list of a great number of deeds and other documents, and, among them, of four deeds, dated in 1810, 1814, and 1828 (which were also described by the names of the parties), with the following note annexed: "The four last instruments are the family settlements of this defendant and Richard Ellison, and relate to estates of great value wholly unconnected with the navigation of Fossdike, or any of the matters in the information mentioned:" and, in the body of his further answer, he submitted that he ought not to be compelled to produce any of the documents mentioned in the schedule; but he said that certain of the parties to the four deeds before mentioned, whose names he mentioned, were interested in the navigation and the terms for 999 years.

Mr. *Pepys* and Mr. *Crombie*, for the relators, now moved that Henry Ellison might be ordered to produce the four deeds dated in 1810, 1814, and 1828, and that the relators might be at liberty to peruse the same, and to take copies thereof, so far as they related to the matters in the information mentioned, or to the interests which any persons whatsoever took in the navigation, or in the terms of 999 years. They said that it appeared, by the description of the deeds in the schedule, that they were assignments of the leases for 999 years; and that the object of the motion was to ascertain whether there might not be other persons who were parties to, or claimed under those deeds, besides those named in the answer, who were necessary parties to the suit.

The *Solicitor-General*[1] and Mr. *Knight*, for the defendant, Henry Ellison, opposed the motion, on the ground that the deeds were part of the defendant's title-deeds, and cited Lady Shaftesbury *v.* Arrowsmith.[2]

The VICE-CHANCELLOR. The information in this case is filed for the purpose of setting aside two leases for 999 years, granted by a corporation, of certain tolls; and the defendant having, by his answer, stated that he has in his possession four deeds relating to the leases, and dated in the years 1810, 1814, and 1828, a motion is made on the part of the Attorney-General that those deeds may be produced. It is met by alleging that the deeds, though they relate to the leases, in fact tend only to show the interest of the defendant and of persons claiming under him; and that, though the Attorney-General has a right to see the leases, he has no right to see the subsequent deeds, which, it is said, relate only to the defendant's title. It is to be observed, how-

[1] Sir William Horne.—ED. [2] 4 Ves. 66.

ever, that the Attorney-General claims to have the tolls free from the leases; and, if he succeeds, every portion of the legal estate in the terms for 999 years must be assigned or surrendered, so that the leases may be no longer set up. He therefore has a direct interest in the deeds in Mr. Ellison's possession. They do not relate solely to any separate and independent title of the defendant; and, therefore, they must be produced.

NEWTON v. BERRESFORD.

BEFORE LORD LYNDHURST, C. B. DECEMBER 16, 1831.

[*Reported in Younge*, 377.]

MR. SWANSTON and Mr. *O. Anderdon* moved for the production of books, papers, and writings, admitted by the answer of the defendant and the schedule thereto to be in his possession. The documents of which the production was sought were tithe collectors' books and statements for the opinion of counsel. The tithe collectors' books were admitted by the answer to relate to the matters in question; but the defendant denied that they would in any manner assist or make out the plaintiff's case.

In support of the application, Evans *v.* Richard,[1] Bennet *v.* Trepas,[2] Firkins *v.* Lowe,[3] Vent *v.* Pacey,[4] and Preston *v.* Carr[5] were cited.

Mr. *Beames*, contra. The question as to the books is, whether they are public or private documents. They are clearly private documents, forming the evidence of the defendant, and which he is not bound to produce. According to the general doctrine, as laid down in Evans *v.* Richard, the moment the answer admits possession the plaintiff is entitled to the production. But Lord Eldon has decided, directly at variance with Evans *v.* Richard, that a mere admission of the custody without more will not do. Possession of itself is not sufficient. In Bennet *v.* Trepas the books had been already produced at the hearing of the cause, and were therefore directed to be produced on the trial of the issue. In Firkins *v.* Lowe the vicar's title was admitted *sub modo;* here there is no admission of the right. In Sampson *v.* Swet-

[1] 1 Swanst. 7.

[2] Bunb. 106, 143; 2 Bro. P. C. 487; Gilb. 191; 1 Eagle & Younge, 782. ["An issue was directed in this cause, to try whether there had been any variation in the payment of tithes, or sums of money in lieu of them, for houses in London, according to the Stat. 37 Hen. 8. It was now moved that the plaintiff should produce at the trial the books of the former rectors; and although it was objected that these were properly private books, and the plaintiff's own evidence, yet as they had before been produced at the hearing of the cause, and as the issue to be tried is to inform the conscience of the court, the jury ought to have all the light the court can give them: so *per curiam* the plaintiff was ordered to produce these books at the trial." — ED.]

[3] M'Clel. 73. [4] 4 Russ. 193. [5] 1 Younge & Jer. 175.

tenham [1] it was held that the plaintiff was not entitled to the production of a deed not connected with his title, but giving title to the defendant. In the present case the collectors' books, according to the answer, which is all that the plaintiff can refer to, are evidence of the defendant's title, and not of the title of the plaintiff. To entitle the plaintiff to the production of the books, there must be some admission in the answer that they will make out the plaintiff's case. Bligh *v.* Benson; [2] Vansittart *v.* Barber.[3]

Swanston, in reply. The case in which Lord Eldon refused to interfere, must have been a case in which the documents sought to be produced were the subject-matter of the suit.

Beckford *v.* Wildman [4] was cited in reply.

Lord Lyndhurst, L. C. B. I have read the bill and answer in this case. The question is, whether the court will now order the production of two descriptions of documents admitted by the defendant to be in his possession, viz., books of collectors of tithes, and statements for the opinion of counsel. With respect to the latter, the question seems to be now settled, it having been repeatedly decided under similar circumstances that a defendant is bound to produce such documents. So in this case I think he is bound to produce them. The collectors' books are stated by the bill to be material to the plaintiff's case. The defendant states that they are material to the case, and he enumerates them in a schedule. I think he is bound to produce these also. The first ground stated for not producing them is, that they are not public, but private documents. Admitting, for the sake of argument, that they are private documents, still that appears to me not to form any ground. Letters, which are evidently not public documents, are constantly ordered to be produced. Other documents, which are also clearly private documents, are daily ordered to be produced. Another point raised is that, if produced, they will not assist the plaintiff's case. They are stated, however, to relate to the matters in question, and it does not seem to me sufficient to say that they will not assist the plaintiff's case. That must be matter of opinion, and may depend on the way in which they are used. Firkins *v.* Lowe has disposed of the question, and I see no ground to differ from the opinion of the majority of the court in that case.

Suppose the books were produced at the trial of an action at law, and it appeared that some of the entries made in favor of the vicar or the occupier, the court would make some arrangement for the cause to stand over until the jury should have an opportunity of looking at the other entries. If this were not to be done there would be very great injustice. *Motion granted.*

[1] 5 Madd. 16.
[2] 7 Price, 205; 3 Eagle & Younge, 956
[3] 9 Price, 641.
[4] 16 Ves. 438.

BOLTON v. THE CORPORATION OF LIVERPOOL.

BEFORE SIR LANCELOT SHADWELL, V. C. DECEMBER 22 AND 23, 1831.

[*Reported in* 8 *Simons*, 467.]

BEFORE LORD BROUGHAM, C. JANUARY 23 AND 24, AND FEBRUARY 13, 1833.

[*Reported in* 1 *Mylne & Keen*, 88.]

THE plaintiffs were merchants and copartners at Liverpool. The defendants, the corporation, had lately brought an action in the King's Bench against the plaintiffs, for the purpose of recovering a sum of money which they alleged to be due to them for tolls or duties in respect of goods exported from and imported into the port of Liverpool by the plaintiffs. The bill was filed against the corporation and the town clerk, for a discovery in aid of the defence to the action, and for an injunction to restrain the action. It charged, amongst other things, that divers cases had been lately submitted to counsel for their opinion on the right of the corporation to receive the tolls and duties, and from which, if produced, it would appear that they had no such right, and that all such cases were then in the possession or power of the defendants; that the defendants had in their possession or power divers charters, grants, deeds, books, accounts, letters, copies of and extracts from letters, cases, written statements, tables or lists of town dues, tolls or duties, bills, informations, pleas, answers, memorandums, papers, and writings relating to the matters contained in the bill, and by which, if produced, the truth of those matters would appear.

The defendants put in a demurrer to part, and an answer to the remainder of the bill. In the answer they denied that any case had been at any time submitted to counsel for their opinion relating to the duties and customs other than such as related to the right of the corporation to receive the duties and customs; but they admitted that they had in their possession various charters, books of account, letters, copies of bills, answers, papers, and writings relating to the matters mentioned in the bill "other than and besides such of the particulars

aforesaid, being in the possession or power of the corporation, as were, or formed, or contained any statements of, the title under which the defendants claimed the dues or customs aforesaid, or as related to any of the matters stated in the bill which were demurred to; and these defendants have in the second schedule [1] to this their answer annexed, and which they pray may be taken as a part thereof, set forth a list and description of the said charters, books, accounts, copies of bills, informations, answers, papers, and writings other than as aforesaid, so being in the possession or power of these defendants, the mayor, bailiffs, and burgesses." The demurrer having been overruled by the Vice-Chancellor, and his Honor's order having been affirmed by the Lord Chancellor, the defendants put in a further answer, in which they stated the right of the corporation to levy the duties in question not to be founded in prescription, as had been before erroneously supposed, but to be derived from a grant made by King Charles the First, as Duke of Lancaster, to the Molyneux family, from whom it was afterwards purchased by the corporation. In their further answer they admitted that they had in their possession a copy of a case or statement, in the shape of a letter, which appeared to have been written in or about 1789, by Mr. Henry Brown, who then acted as solicitor of the corporation, to Mr. Hargrave, the counsel, and which, as the defendants supposed, was prepared for the purpose of having the opinion of Mr. Hargrave on the subject of the then pending disputes between the corporation of Liverpool and the freemen of London relative to the exemption of the latter from duties, in which case the title of the corporation to the tolls and duties was, by a mistake of Mr. Brown, as the defendants believed, supposed to be vested in the corporation by prescription; that, in October, 1804, a case was submitted by the defendant Statham, as town clerk, to certain counsel for their respective opinions on a question relative to the reduction of some of the dues, in consequence of a memorial from the merchants to the common council of the corporation; in which last-mentioned case also it was stated, by mistake, that the corporation of Liverpool were entitled to the duties by prescription; that, at the time of the preparation of the last-mentioned case, the defendant Statham had not discovered the real title of the corporation to the duties; that such last-mentioned case was then in the possession of the defendants; but the defendants submitted that as that case and the former one were made out in ignorance of the title, and by mistake with regard to certain other matters therein

[1] The first schedule contained only the tables of duties claimed by the corporation. The demurrer included the inquiries, in the bill, as to cases, charters, grants, &c., in the possession of the corporation, relating to their title to levy the tolls and duties.

mentioned, and as they related to other questions, they ought not to be produced. The defendants admitted that divers cases or statements had lately been submitted to counsel by the corporation for their opinion on the subject of or relating to the right of the corporation to levy and receive the dues or customs aforesaid; and that all such cases or statements were then in the possession or power of the defendants: that they had in the second schedule [1] to their further answer annexed, and which they prayed might be taken as part thereof, set forth a list of such last-mentioned cases or statements; but that such cases or statements so scheduled as aforesaid were prepared in contemplation of and with reference to the action in the bill mentioned, and with reference to this suit; and the defendants submitted that they ought not to be compelled to produce the same. However, the defendants denied that if such cases and statements, and the cases prepared by Brown and Statham, were produced, it would appear that the corporation were well aware, or had reason to believe or suppose, or that the fact was, that they had no right to levy or receive such town dues, tolls, or duties, or customs, or otherwise than as aforesaid; but that, on the contrary, it would appear that the corporation had the right as then contended for by them. The defendants admitted that they had then in their possession certain grants, deeds, documents, and papers relating to the matters aforesaid; and that they had, in the third schedule to their said answer, and which they prayed might be taken as part thereof, set forth a list of such grants, deeds, documents, and papers. But the defendants said that many of such grants, deeds, and documents were the title-deeds and documents evidencing and showing the title of the corporation to the town and lordship of Liverpool, and to the town dues and customs aforesaid; and that many of such documents and papers were copies of accounts from public offices, and that they had, in the said schedule, particularized and distinguished which of the said grants, deeds, and documents were the title-deeds and documents evidencing the title of the corporation to the town and lordship of Liverpool, and town dues and customs aforesaid, and which of the said documents and papers were copies of accounts from public offices; and the defendants submitted that they ought not to be compelled to produce such grants, deeds, documents, and papers.

The third schedule was headed, "List of copies of documents and papers from public offices, evidencing the title of the defendants, the mayor, bailiffs, and burgesses of Liverpool, to the town and lordship of

[1] The first schedule to the further answer contained a list of books belonging to the corporation, containing accounts of sums received by them, for the duties in question, from 1800 to 1831; and which the defendants were willing that the plaintiffs should inspect.

Liverpool, and the town dues or customs in question." It was divided into five parts, the first of which was headed, "Minister's and receiver's accounts." The second, "Grants, deeds, and other documents." The third, "Copies of other deeds and documents evidencing the title of the defendants, the mayor, bailiffs, and burgesses of Liverpool, and in their possession." The fourth, "Copies of accounts from the books of the stewards of the Molyneux family (under whom the corporation had been lessees), from the year 1581 to 1685, both inclusive." The fifth, "Copies of the bill, answers, interrogatories, depositions, and decree, in a suit in the Duchy Court of Lancaster, between Sir Richard Molyneux and another, and the defendants, the mayor, bailiffs, and burgesses of Liverpool, from the 1 and 2 Philip & Mary, to the 2 and 3 of ditto."

The corporation did not object to produce the documents mentioned either in the first schedule to the first answer, or in the first schedule to the second answer; and a motion was now made that the plaintiffs and their agents might be at liberty to inspect, at Liverpool, and to take copies of and extracts from the documents mentioned in the second answer, and in the second and third schedules thereto, and that those documents might be produced at the trial of the action.

Mr. *Pepys* and Mr. *Kindersley*, for the plaintiffs, in support of the motion. The bill alleges that there are certain documents in the custody of the corporation which afford evidence to negative their right to claim the duties in question. The only ground on which this application can be resisted is, that these documents constitute evidence to prove the defendant's title. But we ask to have them produced, not because they constitute the defendants' title, but because they constitute our defence to the action. If these documents constitute the defendants' title, and ours also, we have a common interest in them, and are entitled to see them. The defendants' title is founded either on grant or prescription. If on grant, we can negative it on production of the documents, in which alone the grant would be contained; if on prescription, we can negative it by reference to the accounts kept by the corporation. It is not disputed that we are entitled to see the documents in the first schedule to the first answer. The description in the body of that answer of the second schedule does not say that the documents mentioned in it are not material to our defence, but that they constitute the title of the defendants. Though they do constitute their title, yet they also contain what is material to our defence, and consequently we are entitled to see them.

The production of the cases submitted to counsel by Brown and Statham cannot be objected to on the ground that they were stated with reference to the present proceedings, for they were stated long

before those proceedings were in contemplation. But the production of them is resisted on the ground that they contain mistaken statements. That is no reason why these cases should not be produced. They may not be conclusive against the defendants; but no documents could be produced which, *prima facie*, would be stronger evidence against the party out of whose custody they come. The statements in these cases may be all erroneous; but no one can say that their contents are not evidence, and that they are not important documents for the adverse party, as he may show from them what was the representation made by the party with whom he is contesting, as to what was the then opinion of that party as to the right which is now the subject of litigation.

The corporation did once claim by prescription, and they may again put forth that title at the trial of the action now pending, or they may abide by the title by grant. But whichever course they adopt, these cases are material documents for the plaintiffs, as they may show by them that the parties themselves do not know their own title; that, at one time, they claimed by prescription, and, at another time, by grant.

Having disposed of the cases which are said to have been stated under a mistake, we come to those which are said to have been stated with reference to or in contemplation of the present proceedings.

It is no objection to the production of a case that it has reference solely to the particular suit. If it could be proved *aliunde* that a party had made a statement that would be unfavorable to his own case, or rather which would be favorable to the case of his adversary, that statement might, of course, be proved by evidence *aliunde*. But if there is no such evidence of the statement, owing to its resting entirely in the knowledge of the party himself, then it is a common rule of a court of equity that he shall discover in his answer the particulars of the statement, and if there is any written document in his possession which goes to show those particulars, that he shall produce that document. To justify their not producing these documents, they merely say that the cases were submitted to counsel in contemplation of this suit. If the parties made a statement which tends to assist their adversary's case, what does it signify that it was made in contemplation of a suit, or of any other particular matter? If the corporation made statements which go to show that the whole world are exempt from the payment of these duties, we are entitled, as a matter of course, to have those statements produced, and more especially if they contain a statement of or a reference to documents which would tend to show that they are not entitled to levy these duties. When the demurrer was argued before the Lord Chancellor, he was struck with the proposition that a

defendant is compellable to produce cases stated with reference to the particular suit then pending. But his Lordship overruled the demurrer *in toto*, and did not give the defendants permission to put in a more limited demurrer.

Next, with respect to the documents mentioned in the third schedule to the further answer. The defendants say that many of such documents and papers are copies of accounts from public offices. Now these public offices are in fact private ones, as no one has a right to go to them. The crown is only an individual, so far as the possessions of the Duchy of Lancaster are concerned, out of which this property was carved and given to the corporation of Liverpool. These papers are not alleged in the body of the answer to be papers evidencing the title of the defendants, but they are distinguished in the body of the answer from the documents of that description. They resemble, in some respects, receipts for moduses, which each party has a right to inspect in order to see whether the modus has or has not varied. If we can show from these accounts that there has not been a perpetual, uniform perception of these dues, we destroy not only the title by prescription, but also the title under the grant from Charles the First, and thereby we set up our own title, which is to be exempt from the payment of these dues. If there has been a variation in the perception of these tolls by the persons under whom the defendants claim, then the title by prescription is destroyed. The payments were made by persons standing in the same situation as the plaintiffs. The plaintiffs may be said to represent all the world. These payments are not merely *inter alios;* and therefore the plaintiffs have a right to see what payments have been made by them, and also by those whom they represent, or rather stand in the place of, in order to show that there has been a variation and break in the perception of them, by which the title by prescription will be destroyed.

Next, as to the grants, deeds, and documents comprised in the third schedule. These are set forth in the schedule under two distinct heads: first, "Grants, deeds, and other documents;" second, "Copies of other deeds and documents evidencing the title of the defendants." It is clear, therefore, that the documents contained under the first head do not evidence the title of the corporation. First, as to those documents that do evidence the title of the corporation; for, if we succeed as to them, *a multo fortiori* we shall be entitled to have the others produced. If, anterior to the grants made to the corporation, the crown (as we say these grants will show) never exercised the right which the corporation now claim, then no such right was conferred by the grants. The grants, therefore, are part of our evidence. The corporation did formerly claim by prescription, and they may attempt to support their claim by that title in

the action at law. Are we not then entitled to a production of these early documents in order to negative the prescription, or to show that they do not know their own title? Then the defendants say that many of these grants and documents are the evidence of their title to the town and lordship of Liverpool, and to the town dues and customs aforesaid. Now it is true that a defendant cannot be compelled to produce documents that relate exclusively to his title. But it is equally true that if they do not relate exclusively to his title, but will tend to show that the plaintiff's is a better title, the court will compel the production of those documents. In a case in which A. is claiming title to an estate against B., who is in possession of the estate and also claims title to it, it is not sufficient for A. to destroy B.'s title; for by so doing he will not establish his own. But in this case the title of the corporation is against common right, and the destruction of it is the title of the plaintiffs. Their title is a title to exemption, which is defeated by the corporation having the right. If the corporation have not the right, then the plaintiffs' title to exemption succeeds. For these reasons, we apprehend that we are entitled to a production of those documents to which the strongest objection applies, namely, that they evidence the title of the defendants. And if we are entitled to see those documents, we are of course entitled to see the other class of documents to which that objection does not apply.

Then we come to the next branch of the third schedule, which contains copies of accounts from the books of the stewards of the Molyneux family, under whom the corporation were lessees. The observation made as to the other accounts applies to these also, namely, that we are entitled to inspect them in order to show that there has been a break or variation in the course of the payment of the duties.

Next, as to the copies of bills and answers, interrogatories, depositions, and decree in a suit in the Duchy Court of Lancaster between Sir Richard Molyneux and another, and the defendants, the corporation.

The production of these documents will probably be objected to, on the ground that copies of them may be procured from the duchy court. But, although evidence which the defendant has in his possession may be procured from another quarter, the court will compel him to produce it, and will not permit him to put the plaintiff to the expense of procuring it *aliunde*.

Sir *Charles Wetherell* and Mr. *Duckworth*, for the defendants. This is a case in which, the corporation having brought an action against the plaintiffs to recover certain tolls, the plaintiffs filed their bill, alleging that the corporation had no title at all to the tolls, or rather seeking to discover what that title was. A demurrer was put in to the bill so far as it regarded the question of title; and it was determined by your

Honor, and afterwards by the Lord Chancellor, that the defendants must answer fully. Now they have answered fully, and the question is, whether the corporation are to be compelled to produce their documents. The corporation have stated in their answer that they have been in receipt of these tolls for nearly three centuries, first as lessees of the Molyneux family, who held them under grants from the crown, and afterwards as purchasers of the fee from the Molyneux family. Now, as to the documents mentioned in the first schedule to the first answer, they do not relate to our title, and we do not resist the production of them. But as to the charters and other papers in the second schedule to the first answer, though they may relate to some of the matters in the bill mentioned, yet they are utterly immaterial to the plaintiffs' case, and no reason is stated why they should see them; and, as it may be very important to us that they should not be produced, we contend that we ought not to be compelled to produce them.

Next, with respect to the documents mentioned in the second answer. The accounts relate to the rents received on the different leases which have been granted from time to time of these tolls; they are, therefore, part of our title. The objection to the production of the copies of documents from public offices is twofold: first, that they are in public offices, and are, therefore, accessible to the plaintiffs; and, secondly, that they are evidences of our title, and that the plaintiffs have shown no common interest in them. Now, in the Court of Exchequer, where a defendant has in his possession extracts from Doomsday Book, the Parliamentary Survey, or other records of the like nature, on a motion for production of documents those papers are either not asked for, or, if they are asked for, they are refused because they are obtained from public offices, and it would not be just that a defendant should purchase them for the benefit of the plaintiff, who has just the same access to the originals as the defendant has.

[The VICE-CHANCELLOR. What authority do you rely upon when you say that it has been the practice to refuse the inspection of such documents?]

We rely on no particular case, for it is the universal practice, and is of almost daily occurrence in the Court of Exchequer.

[The VICE-CHANCELLOR. If there is a written document which the defendant has paid for, but which relates to the plaintiff's title, the defendant is bound to produce it for the inspection of the plaintiff.]

The other ground of objection, and which applies to all the other documents mentioned in the second answer, is, that they relate to the title of the corporation. The ground on which the plaintiffs put their right to the inspection of these documents is, not that they have any interest in them, or that they claim title to these tolls, but because they

are endeavoring to impeach our title to them. It is, however, contrary to the established principles of this court that a party should be required to produce documents which may tend to impeach his own title, unless it is shown that his adversary has an interest in them. If a party is in possession of an estate, and an ejectment is brought against him, and he files a bill of discovery against the plaintiff in the action, he cannot compel a production of his adversary's title-deeds by merely alleging that they would show that the latter had no title to the estate. The plaintiffs here admit that they have no title to the tolls. And it is clear that, if they had a title, they could not obtain a production of these documents solely for the purpose of impeaching the defendant's title. Does, then, the fact of the plaintiffs having no title give them a right to an inspection of these documents? It is not impossible that there may be blots in the title of the corporation to these tolls, in which case the Molyneux family might claim them.

We now come to the cases; and, first, those stated by Mr. Brown and Mr. Statham. It is true that the title of the corporation was stated in them to be by prescription, but they do not claim by that title now. Besides, those cases related to questions with which the plaintiffs have nothing to do. One of them had reference to a dispute between the corporation and the freemen of London, and the other to the power of the corporation to diminish the tolls. The plaintiffs have no interest in the questions to which those cases relate, and, therefore, are not entitled to see them.

Then as to the other cases. They were all stated either in contemplation or during the pendency of the present proceedings at law and in equity, and consequently the defendants ought not to be compelled to produce them. Hughes *v.* Biddulph;[1] Vent *v.* Pacey;[2] Williams *v.* Mundie.[3] It was stated on the other side, as the ground on which these cases ought to be produced, that if a defendant makes declarations, however near the trial, they may be given in evidence against him. Now it is quite true that if a party makes declarations in public, they may be received in evidence against him; but it has always been considered to be the law, and to be necessary for the well-being of society, that communications which pass between a client and his solicitor should be protected. Both principle and practice, therefore, are against the production of these cases.

We submit that the plaintiffs are not entitled to have an inspection of any of the documents, except those that are contained in the first schedule to the first answer, and in the first schedule to the second answer.

[1] 4 Russ. 190. [2] Ib. 198.
[3] 1 Ryan & Mood. 34. And see Garland *v.* Scott, 3 Sim. 396.

Mr. *Pepys*, in reply. If documents are material to the purpose for which the plaintiff seeks a discovery, he is entitled to have them produced, although they relate to the defendant's title. The ground on which a defendant is not entitled to the production of his adversary's papers is not because they relate to his adversary's title, but because they are not material to his own. It is upon this principle that an heir-at-law is not entitled to an inspection of deeds. His title is independent of all deeds, and he has nothing to do but to prove the seisin of his ancestor. A tenant in tail who has been barred by a recovery, is entitled to see the deed by which the estate tail was created, although it is the foundation of his adversary's title as well as of his own. In the Princess of Wales *v.* Lord Liverpool,[1] the plaintiff was suing on a bill of exchange, which was the foundation of her title; but it appeared to the court that there were certain circumstances connected with that document which might afford the defendant at law a ground of defence by impeaching the plaintiff's title to sue; therefore Lord Eldon directed a production of that document.

It is nowhere alleged in the answer of the corporation that the production of the documents in question would not assist the plaintiffs' defence to the action. It is idle, in this case, to talk about the title to this property. It is not the title that is in dispute; but the question is, whether by the grant under which the corporation claim any right is conferred to exact certain heavy dues. Their title is not at all in discussion. The only question is, whether the right to exact these dues is incident to their title.

Then as to the cases. It cannot be denied that we are entitled to see those that were stated by Brown and Statham. The question with respect to the others is one of greater difficulty. Now the ground on which a solicitor is protected from divulging communications made to him by his client is that they are confidential, and they are equally protected at whatever distance of time they have been made. But the House of Lords has decided that statements of facts for the opinion of counsel are not within the protection. Radcliffe *v.* Fursman.[2] The same principle that applies to cases stated some years back is equally applicable to cases stated pending, and with reference to existing proceedings. If, as the fact is, they are not protected because they are confidential communications, they are not protected at all. The time at which they were submitted to counsel cannot be material. Cases are never submitted to counsel unless there is an expectation of a dispute arising. How can it be material whether that expectation is realized now or ten years hence? The Attorney-General *v.* Berkeley.[3] The cases that have been cited for the defendants do not at all interfere with

[1] 1 Swanst. 114. [2] 2 Bro. P. C. 514. [3] 2 Jac. & Walk. 291.

the doctrine laid down by Lord Eldon in The Princess of Wales v. Lord Liverpool. In Hughes v. Biddulph it was decided that confidential communications between the defendant and her solicitors, or between the country solicitor and the town solicitor, in their relation of client and solicitors, either during the cause or with reference to it, though previous to its commencement, ought to be protected; but all the other papers were ordered to be produced. That case can have no effect upon the one now before the court; for all confidential communications are protected upon what occasion soever, or at what time soever they are made. Nor has the case of Vent v. Pacey any closer application to the present question. It was there held that the plaintiff was not entitled to the production of a letter admitted by the defendant to be in his possession, but which was written by him to his solicitor, and which directed the solicitor to take the opinion of counsel upon the question in dispute between the parties. Neither of those decisions shows that a case stated for the opinion of counsel after a suit is in contemplation, or has been commenced, ought not to be produced. In both those cases the documents were protected, on the ground of their containing confidential communications between the solicitor and client. In Newton v. Berresford,[1] which was very recently before Lord Lyndhurst, C. B., and which was a case where parishioners filed a bill against their rector, stating that he had in his possession certain cases touching the matters in question, which he or his predecessors had stated for the opinion of counsel at some former time, and certainly before the suit was commenced, his Lordship ordered a production of those cases. If A. takes the opinion of counsel on a matter which is expected to be a subject of litigation between him and B., and afterwards the litigation arises, B. can compel a production of that case; for it does not signify whether the case was stated with a view to a litigation which takes place the next year, or twenty years afterwards. It has been decided that cases for the opinion of counsel are not protected on the ground of their being confidential communications; and if they are not protected on that ground, they are not protected at all.

With respect to those documents which are said to be in public offices, there cannot be any ground for resisting their production. The defendants have not told us where the public offices are in which they are deposited. If they have got papers in their possession, which are evidence against them, and material for our purpose, we are entitled to see them. There can be no doubt of the materiality of these papers, for they are, some of them, the ancient accounts kept by themselves, and by the crown before their title accrued. We may find, if the production of these accounts is compelled, that there is as little ground

[1] Younge, 377.

for the claim by prescription as for that by grant. If these payments are found not to have been from time immemorial, that fact would have great weight in deciding the question as to whether their title is good or not. They may relate to their title, but they do not deny that they are material to our case.

The VICE-CHANCELLOR. In this case I understand there is no objection made to the production of the documents contained in the first schedule to the first answer, and in the first schedule to the further answer.

With respect to the documents contained in the second schedule to the same answer, the part of the answer which refers to the schedule is in these words: "The defendants admit that they have in their possession or power various charters, books of account, &c., relating to the matters in the bill mentioned (other than and besides such of the particulars aforesaid being in the possession or power of these defendants as are, or form, or contain any statements of, the title under which these defendants claim the town dues or customs aforesaid, or as relate to any of the matters stated in the said bill which are hereinbefore demurred to); and these defendants have, in the second schedule to their answer annexed, set forth a list and description of the said charters, &c., other than as aforesaid," which sentence I understand to be a representation that the defendants have, in the second schedule, set forth copies of the documents which do not relate to their title, or to that matter from a discovery of which they wish to protect themselves by demurrer, but do relate to matters of which they admit the plaintiffs are entitled to a discovery; and on that statement (that being all) it appears to me that the plaintiffs are entitled to have an inspection of those documents. But if there is any thing special with respect to the nature of those matters, a discovery of which the defendants have admitted they are bound to make, so as, upon the mere inspection of what these matters are, it would appear that the plaintiffs have no right to have the inspection, I must read over the first answer more particularly than I have had an opportunity of doing.

With respect to the papers contained in the first schedule to the second answer, it appears upon the face of the answer that the defendants are willing that the plaintiffs should have an inspection of them.

Then as to the cases stated by Brown and Statham for the opinion of counsel. It appears in the body of the answer that those cases represented that the title of the defendants to the tolls which they claim was by prescription. But it also appears, by the same answer, that the title of the defendants was not a title by prescription, but by grant. Those cases, therefore, contain a representation that the defendants have not that title which they allege they have, and will

assist the plaintiffs in defending themselves against the claim made by the defendants; and, as there is no statement that those cases were prepared with reference to the action which caused this bill to be filed, I think that the plaintiffs are entitled to an inspection of them.

With respect to the other cases, it is alleged in the body of the answer, and the dates of them which appear in the schedule show, that they were prepared in contemplation of and with reference to the action in the bill mentioned, and with reference to this suit. Now the decision, which has been referred to, in the House of Lords does not appear to have had any relation to a case submitted to counsel with regard to the suit; and it is admitted that a party cannot, by means of a bill in this court, obtain from a defendant a discovery of a communication which he has made to his counsel. There is no instance of a bill being filed, suggesting that at a consultation between a party and his counsel statements were made by the party which would defeat his claim, and praying for a discovery of those statements. The late Lord Chancellor, when his attention was expressly called to the point, was of opinion that communications between a party and his solicitor in the progress of the cause, or with reference to the cause previous to its being instituted, ought not to be divulged; and it appears to me that there is no sound distinction between a communication made by a party to his solicitor during the progress of the suit, or with reference to the suit immediately previous to its being instituted, and a statement made by the solicitor to counsel under the same circumstances. If a party ought not to be compelled to produce a letter written by himself to his solicitor stating the circumstances of his case, can it be said that when those same circumstances are, by the direction of the party, stated in the shape of a case for the opinion of counsel, they shall be divulged? The decision in Hughes *v.* Biddulph establishes a principle which is directly applicable to all the cases in the possession of the corporation, other than those stated by Brown and Statham, and my opinion is, that they ought not to give an inspection of any of their cases except those which were prepared by Brown and Statham.

With respect to the documents contained in the third schedule, I understand that they are represented generally to be documents which evidence the title of the defendants. In the body of the answer the corporation state that they have in their possession certain grants, deeds, documents, and papers relating to the matters aforesaid, or some of them, but that many of such grants, deeds, and documents are title-deeds, evidencing and showing the title of the defendants to the town and lordship of Liverpool, and to the town dues and customs aforesaid, and that many of such documents and papers are copies of accounts from public offices. In the body of the answer, therefore, they have

not, as I understand it, alleged that those copies of accounts from public offices evidence their title. But the schedule is part of the answer, and contains a preliminary description, which, in my mind, applies to all the portions of the schedule which follow it. That description is in these words: "List of copies of documents and papers from public offices evidencing the title of the defendants to the town and lordship of Liverpool, and the town dues and customs in question." Now, in the course of the reply it was said very truly that, where there is a deed relating to the title of both parties, production of it will be ordered, but that where a person claims as heir-at-law, the documents which constitute the title of the defendant shall not be produced, because the plaintiff's title does not depend upon documentary evidence; and it appears to me that there is a very clear analogy between the case of an heir-at-law claiming an estate, and the case of the plaintiffs in this cause, who *prima facie* have a right to be exempted from the payment of any toll; and it lies on those who insist on having a title to levy these tolls to make out a title contrary to the force of the common law. But then the same principle also extends to exempt these defendants from manifesting their title which is to the prejudice of the *prima facie* right of the plaintiffs to be exempted from the payment of toll. And inasmuch as these documents are described as being documents which evidence the title of the defendants, and as nothing is to be inferred from any passage in the answer that they evidence the title of the plaintiffs (which they might do, though they evidenced the title of the defendants), I am of opinion that, with respect to all the documents contained in the third schedule, an inspection ought not to be granted.

The plaintiffs having renewed their motion before the Lord Chancellor, Mr. *Pepys* and Mr. *Kindersley*, for the motion, and the *Solicitor-General* (Sir *W. Horne*), Sir *C. Wetherell*, Sir *E. Sugden*, and Mr. *Duckworth*, against it, followed respectively the same general line of argument as they had taken in the court below.

In addition to the cases cited for the plaintiff upon the original motion, reference was made to Preston *v.* Carr,[1] as an authority to show that, upon the rule which enforces the production of cases for counsel's opinion, no distinction has ever been taken for the purpose of confining the order to such cases as had not been prepared with reference to existing proceedings. The different topics urged by counsel in support of the application are so fully stated and discussed in the Lord Chancellor's judgment, that it has been considered unnecessary to report them in detail.

The Lord Chancellor. In this case, an action for tolls having been brought by the corporation against the plaintiffs in equity, the

[1] 1 Younge & Jer. 175.

question was touching the right of the plaintiffs, who were the defendants at law, to have certain documents referred to in the schedules to their answer produced in aid of the defence at law; and those documents, being of two descriptions, raised two separate questions: the one relating to papers of various kinds, evidencing the title of the corporation to the town and lordship of Liverpool, and to the dues and customs in question; the other relating to cases and statements submitted to counsel in contemplation of and pending the present proceedings at law and in equity.

First, as to the documents evidencing title. I entertain the same view of this question which his Honor did when he refused the application. I take the principle to be this: A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. Thus an heir-at-law cannot, in that character, call for the general inspection of deeds in the possession of a devisee.

In Lady Shaftesbury *v.* Arrowsmith,[1] Lord Loughborough said "he could not find any spark of equity in such an application as that;" admitting that the heir in tail (and so he decided) had a right to inspect settlements creating estates in tail general, the party stating himself to be the heir of the body.

The plaintiff here does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title; they are the corporation's title and not his, and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs, and he says, "Prove me liable if you can." The corporation have certain documents which, they say, prove this liability. He cannot call for these documents merely because they may, upon inspection, be found not to prove his liability, and so to help him and hurt his adversary, whose title they are.

The case of the Princess of Wales *v.* Lord Liverpool[2] was cited, and it is perhaps a strong case. But it is a peculiar one. Lord Eldon at first refused the application, and then granted it in the special circum-

[1] 4 Ves. 66. [2] 1 Swanst. 114, 580.

stances. The instruments were two promissory notes, upon which the suit was brought against executors. Lord Eldon, in delivering judgment upon that case, threw out many observations as to what might appear on an inspection. The notes, he said, might be duplicates; they might have important variations; some question might arise on the stamps; and they must, at any rate, said his Lordship, be given up at the hearing, for an indemnity will not do; at least, that is questionable. Yet he held all this matter of surmise not to be enough; for he required the defendant to state in what respect the inspection of the notes was material for his defence, and upon affidavits of circumstances impeaching their genuineness, he thought enough appeared to warrant an order that the defendant should not be compelled to answer till he had obtained the inspection. It must be admitted that there the thing sought, and in substance allowed to be inspected, was not any matter collateral, but the very instrument on which the title of the plaintiff rested, and which could only be the title of the defendant by failing to support that of the plaintiff. His Lordship may have considered the instruments as a sort of title common to both parties; but it could only be so by the one party setting them up, and the other impeaching them on flaws discoverable by inspection. It must, however, be observed that this was a kind of case in which, at law, inspection would have been given.

In this case, therefore, I can, upon the whole, see no reason for coming to a different conclusion from that at which his Honor arrived when he refused inspection of those parts of the corporation's title, as being theirs, and not the plaintiffs', and not common to both.

Next, with respect to the cases sought to be inspected. These are the cases laid before counsel in contemplation of the action and pending the proceedings. Their dates come down to the 29th of October, 1831, the bill having been filed in November, 1830, and the answer sworn in December, 1831. Most of the cases were laid before counsel after the demurrer was argued; nay, after it came before me on appeal; some of them on the very eve of the present application to the Vice-Chancellor. They are sworn in the answer "to have been prepared in contemplation of and with reference to the action and suit." It is suggested that one of them is the very brief for counsel at the trial of the action, to prepare himself against which the plaintiff in equity claims the inspection. And whether this be so in point of fact or not, is immaterial, as it may well occur in any cause, if the cases laid before counsel in reference to that cause can be obtained by coming to this court.

It seems plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence may, and often does, contain the whole of his evidence, and may be, and frequently is,

the brief with which that or some other counsel conducts his cause. The principle contended for that inspection of cases, though not of the opinions, may always be obtained as of right, would produce this effect, and neither more nor less, that a party would go into court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel. Nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least if he were plaintiff) postpone the trial, and obtain a discovery of those new circumstances which, in all likelihood, had been laid before counsel for advice. If it be said that this court compels the disclosure of whatever a party has at any time said respecting his case, nay, even brings his conscience to disclose his belief, the answer is, that admissions not made or thoughts not communicated to professional advisers, are not essential to the security of men's rights in courts of justice. Proceedings for this purpose can be conducted in full perfection, without the party informing any one of his case except his legal advisers. But without such communication no person can safely come into a court, either to obtain redress or to defend himself.

Yet violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, if the authorities are in its favor we must submit. Radcliffe *v.* Fursman [1] is the case commonly relied on in these questions. It is a decision of Lord King's, affirmed in the House of Lords. If it had decided the question, there would have been no alternative but submission. The report in Brown's Parliamentary Cases is imperfect, and in one respect not correct, for it conveys an inaccurate notion of the nature of the demurrer. But even by the report, and certainly by the printed cases, which I have examined together with my noble and learned predecessor, it appears plain that the record did not show any suit to have been instituted or even threatened at the time the case was stated for the opinion of counsel; and the decision being upon the demurrer, the court had no right to know any thing which the record did not disclose. All the court knew was, that a case had been laid before counsel at some time in order to satisfy the party consulting whether his rights had been affected by a certain lapse of time. And the ground on which the production was resisted appears to have been the mischief of disclosing statements confidentially made for the private ease and satisfaction of parties.

So far this decision rules that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel in reference to or in contemplation of, or pending the suit or action, for the purposes of which the production is sought.

[1] 2 Bro. P. C. 514, Toml. ed.

The case of Preston v. Carr[1] would seem to have carried the doctrine of Radcliffe v. Fursman this one most material step further, but apparently without intending to do so, for one of the learned judges says that he agrees with those who have expressed an opinion that it should not be carried further.

There is, however, a decision of this court since Preston v. Carr, by which I am disposed to be guided, in deference as well to all the principles upon which it proceeds as to the authority of the noble and learned judge who pronounced it; I mean the case of Hughes v. Biddulph.[2] I can see no difference between the letters there excepted from the order to produce documents, and the cases laid before counsel. They were letters which passed between the client and the solicitor, and between two solicitors employed by the client in the progress of the cause, or with reference to the cause before it was instituted. This was the line which Lord Lyndhurst drew, and I can see no difference between the statements of a case in such correspondence, and the statements which are laid before counsel in the form of a case for their opinion. Something which occurred in the correspondence might happen to be kept out of the case so laid before counsel, and that might be a motive in one instance for not refusing the production of the case, while the party might have a reason for refusing the letters. But that is accidental, and cannot affect the principle, for it is clear that the case may, and in such circumstances probably will, contain as much matter as the letters which the client cannot safely disclose; and it may very well happen that the case prepared by the solicitor should contain more than the letters.

Vent v. Paccy,[3] which followed two years after, though reported next in the same volume, is said to throw a doubt upon Hughes v. Biddulph, at least as far as regards its application to this question. In the first place, however, the Vice-Chancellor having acted on Hughes v. Biddulph, as regards the letters, his order was appealed from and affirmed. But next, it is said that a case laid before counsel appears incidentally to have been produced. The observation which I have made will explain that; for the party may not have resisted the production on the accidental ground mentioned of the letters happening to contain what he was reluctant to disclose, though the case did not. But be that as it may, there was no contest on the production of the case, and the question was not decided.

I am, therefore, upon the whole, of opinion that cases laid before counsel in the progress of a cause, and prepared in contemplation of and with reference to an action or suit, cannot be ordered to be produced for the purposes of that action or suit.

[1] 1 Younge & Jer. 175. [2] 4 Russ. 190. [3] 4 Russ. 193.

KENNEDY v. GREEN.

BEFORE SIR LANCELOT SHADWELL, V. C. FEBRUARY 2, 1838.

[*Reported in* 6 *Simons*, 6.]

THE plaintiff, Mrs. Kennedy, had employed Bostock, her solicitor, to lay out a sum of money for her on mortgage, and accordingly he invested part of that sum on mortgage of some leasehold houses. The mortgagor afterwards became bankrupt, and Bostock purchased the equity of redemption of the houses from his assignees. Afterwards Bostock called upon the plaintiff and produced a document, which he represented it was necessary for her to execute, in order to enable her to receive the interest of the mortgage-money more punctually in future; and the plaintiff, on the faith of that representation, signed the document. Bostock afterwards became bankrupt, and the payment of the interest having ceased, the plaintiff made inquiries as to the cause, when she discovered that the document which she had signed was an assignment of the mortgage to Bostock, and that he had mortgaged the houses to the defendant Kirby.

The bill was filed to set aside the assignment for fraud. It alleged that the plaintiff executed the deed under the impression that it was a power of attorney; that when she signed the receipt on the back of the deed, the deed was folded down, so that she could not see what she was signing; and that the fraud practised on the plaintiff in procuring her signature to the receipt would appear on inspection of the deed. Kirby, in his answer, said that he had advanced £2000 to Bostock on the security of the houses, and denied generally all notice or suspicion of any fraud having been practised on the plaintiff in procuring the assignment from her.

The plaintiff now moved for a production of the assignment.

Mr. *Pepys* and Mr. *Girdlestone*, in support of the motion, cited Balch *v.* Symes,[1] The Princess of Wales *v.* The Earl of Liverpool,[2] and Beckford *v.* Wildman.[3]

Mr. *Knight* and Mr. *Hughes*, for the defendant Kirby, relied on

[1] 1 Turn. & Russ. 87. [2] 3 Swanst. 567. [3] 16 Ves. 438.

the defendant being a purchaser for valuable consideration without notice, and cited Tyler *v.* Drayton,[1] Rowe *v.* Teed,[2] and Codrington *v.* Codrington.[3]

The VICE-CHANCELLOR. This is a motion for the production of a deed which constitutes the defendant's title, and which the plaintiff seeks to impeach for fraud. The plaintiff alleges that certain suspicious circumstances appear on the back of the deed, which tend to show that the execution of it was obtained from her by fraud; and, though the defendant says that he is a purchaser for valuable consideration without notice of the fraud, he does not deny that he had notice of those circumstances. Now a purchaser for valuable consideration is bound to answer all the allegations that tend to show that he had notice of the fraud, and the defendant not having done so, I think that he ought to produce the deed. *Motion granted.*[4]

[1] 2 Sim. & Stu. 309. [2] 15 Ves. 872. [3] 3 Simons, 519.

[4] The cause was afterwards heard before Sir J. Leach, M. R. His Honor decreed in the plaintiff's favor, on the ground of the suspicious circumstances appearing on back of the deed, and Lord Brougham, C., affirmed the decree.

BURRELL *v.* NICHOLSON.

BEFORE LORD BROUGHAM, C. AUGUST 15, 1833.

[*Reported in* 1 *Mylne & Keen*, 680.]

THE bill was filed for discovery in aid of the plaintiff's case upon an action at law, which was brought for the purpose of determining the question whether he was a resident householder within the parish of St. Margaret, Westminster, and liable as such to parochial rates. The defendants were the parish officers and the vestry clerk of St. Margaret's.

Sir *E. Sugden* and Mr. *Kindersley* moved that certain books and papers relating to the matters in question in the cause, and which one of the defendants, Stephenson, the vestry clerk, by his answer admitted to be in his custody and possession, might be produced for the inspection of the plaintiff.

The *Attorney-General*,[1] Mr. *Pepys*, Mr. *Treslove*, and Mr. *Parker*, for different defendants, opposed the motion.

The LORD CHANCELLOR. This was a motion by the plaintiff for the production of books and papers admitted to be in the hands of one of the defendants. An action of trespass is pending at law, which has for its object to determine whether or not Richmond Terrace and Privy Gardens are within the parish of St. Margaret, Westminster, a distress having been made by the parish upon the goods of the plaintiff, as occupier of a house in the disputed district, and the action thereupon brought by him to try that question.

Stephenson, the defendant against whom the present motion was made, is the vestry clerk of the parish.

The bill charges that the defendant Stephenson has in his possession divers maps, plans, and surveys of the parish and of the *locus in quo*, and also divers rate-books, and other books of accounts, pleadings, cases, and statements for counsel's opinion, orders for removal, relief and burial of paupers, receipts, documents, and papers relating to the matters in the bill (that is, the matters in question at law), and that if these were produced the truth of the plaintiff's case would appear.

[1] Sir William Horne. — ED.

The defendant by his answer denies having certain of the kinds of documents charged, such as maps, plans, and surveys, pleadings, and cases, &c., but he admits having others, as rate-books, minute-books, account-books, and orders, and he sets forth the particulars in a schedule which occupies fourteen or fifteen folios, and he refers to a mass of books and papers by date and title, and also to chests of other documents, so that the bare inspection of the whole would be a work of much time and labor. But he does not deny that these documents contain matters connected with the plaintiff's right, and by which that right would be made to appear.

I am of opinion that the production of these papers and books comes within the rule under which they are sought to be produced. The question is one of boundary, and these documents contain the evidence common to both parties, — the evidence of the title of both. They cannot be said to stand in the same predicament with the documents which in Bolton v. The Corporation of Liverpool were refused by the Vice-Chancellor,[1] and afterwards, in February, 1833, by this court,[2] affirming his Honor's order; and although at first I was inclined to doubt whether they did not come within the principles there laid down, yet upon further consideration I think they do not, but must be taken upon the statement, undenied on the pleadings, to be evidence common to both parties.

It would be a grevious thing if in such a case as this the question at law were tried with only the feeble aid given to the party and the court by a *subpœna duces tecum*, the court having no power to order a previous inspection of papers which are voluminous enough to fill a room.

As I entertained some doubt how far this case clashed with the former, wherein I agreed with the Vice-Chancellor, I deemed it a respect due to his Honor that I should communicate with him upon the subject; and, after examining the pleadings, he has arrived at the conclusion to which I had come, and indeed considers that there is no doubt at all of the plaintiff's right to the production.

[1] 3 Sim. 467. [2] 1 Myl. & K. 88.

LOWNDES *v.* DAVIES.

BEFORE SIR LANCELOT SHADWELL, V. C. FEBRUARY 15, 1834.

[*Reported in* 6 *Simons*, 468.]

THOMAS JAMES SELBY devised his real estates in Buckinghamshire to his heir-at-law, for the finding out of whom he directed advertisements to be published immediately after his death; but, if no heir should be found, he devised the estates to William Lowndes, subject to his debts, legacies, &c.

The testator died on the 7th of December, 1772. After his death advertisements were published pursuant to the direction in his will, and several persons claimed to be his heirs. On the 28th of October, 1773, William Lowndes filed his bill against those claimants, praying that the will might be established, and that issues might be directed between himself and the claimants to try who was the testator's heir, and if it should be found that the testator left no heir, then that he might be declared entitled to the estates. The cause was heard on the 23d of April, 1779, when it was ordered that the claimants should be at liberty to bring an ejectment to recover possession of the premises. The action was tried on the 22d of April, 1780, when a verdict was found for W. Lowndes, the defendant in the action. On the hearing of the cause for further directions on the 28th of March, 1783, the will was established, and the trusts were ordered to be performed, and it was declared that the estates were to be considered as belonging to W. Lowndes, and that he should be let into possession thereof, and that the title-deeds should be delivered to him.

Lowndes accordingly entered into possession of the estates, and remained in possession till his death. In Trinity term, 1784, he levied a fine *sur conuzance de droit come ceo*, &c., of the estates, with proclamations, the last of which was made prior to June, 1785, and thereby the bill alleged he became seised in his demesne as of fee of the estates. William Lowndes died on the 3d of May, 1813, leaving William Selby Lowndes his eldest son and heir, who thereupon entered into and had ever since continued in possession of the estates.

On the 6th of December, 1832, T. Davies and Elizabeth his wife, in her right, issued a writ of right against W. S. Lowndes to try their right to the estates, and on the same day they filed a bill against him, stating the will, the proceedings in the former suit, that neither they nor any ancestor through whom Elizabeth Davies claimed were parties to that suit, and that they had lately discovered, upon investigation of Elizabeth Davies's pedigree, that she was the testator's heir; and the bill prayed that it might be declared that E. Davies, as such heir, was entitled to the estates, and that W. S. Lowndes might deliver up possession thereof to her, and account to her for the rents; or that an issue might be directed to try whether she was the testator's heir, or that, notwithstanding the decree in the former suit, she might be at liberty to proceed at law to recover possession of the estates.

The count delivered by Davies and wife in the writ of right alleged that Erasmus Lloyd was the testator's heir at his death. It then traced Erasmus Lloyd's pedigree, and averred that on his death the right to the estates descended to John Lloyd, his son and heir, from whom it descended to Catherine, Frances, and Mary, his three daughters and co-heirs, and from them to Elizabeth Davies, who was the daughter of Catherine.

The bill in this cause, which was filed on the 10th of June, 1833, by William Selby Lowndes against Davies and wife, after stating as above, alleged that if the allegations in the count were true, Davies and wife had no right to the estates, inasmuch as it was too late for them to claim any interest under the will, as they were barred by length of time and by the fine and nonclaim. The bill then contained charges as to Erasmus Lloyd and his deceased descendants having been within the realm and under no disability, and as to the periods of their deaths, in order to show that they were not exempted from the operation of the Statute of Limitations or of the fine and nonclaim; and for the same purpose it required the defendants to set forth the times of the births and deaths, and the places of residence of Erasmus Lloyd and his deceased descendants, and other particulars relating to them, and when Elizabeth Davies was born, and when she and her husband were married, and where they had from time to time resided; and also to set forth a schedule of all deeds, pedigrees, and other documents in their possession relating to the matters aforesaid; and it prayed that the defendants might be ordered to elect whether they would proceed in their suit in equity or at law, and if they should elect to do the former, or if the court should be of opinion that the merits of the case required it, that they might be perpetually restrained from proceeding in their action at law, and from, in any manner, disturbing the plaintiff in the possession of the estates.

The defendants answered those parts of the bill which preceded the allegation as to the delivery of the count in the writ of right; but they demurred to the discovery sought by the rest of the bill, and also to so much of the bill as sought that they might be ordered to elect whether they would proceed at law or in equity, and to all the relief consequent upon such election, the plaintiff, on his own showing, not being entitled to such order or relief.

Mr. *Pepys*, Mr. Serjeant *Stephen*, and Mr. *Spence*, in support of the demurrer, said that the answer gave all the discovery that was necessary for obtaining the equitable relief sought by the bill, namely, the perpetual injunction; that the rest of the discovery was sought, not with a view to the equitable relief, but to the plaintiff's defence to the writ of right, and either was immaterial, or related to the defendants' pedigree, and other particulars of their case, which they must prove at the trial of the writ of right; that an order for a plaintiff to elect whether he would proceed at law or in equity was never prayed for by the bill, and was not a subject of relief, but ought to be obtained by motion, on the putting in of the answer to the original bill; and, consequently, that though the plaintiff might, on his equitable case, be entitled to the perpetual injunction, he could not be entitled to it as consequential to the election irregularly prayed by the cross-bill.

Sir *E. Sugden*, Mr. *Knight*, and Mr. *Parry*, appeared in support of the bill.

But the VICE-CHANCELLOR, without hearing them, said: I confess that this is the first instance I have ever seen of a bill filed under such circumstances, or of a bill asking that a plaintiff in equity might be put to his election whether he would proceed at law or in equity. But, having regard to the case which is stated, I think that it was very judicious in Mr. Lowndes to file this bill, because it enables him to extort from Mr. and Mrs. Davies an answer as to every fact which can be brought forward by them to sustain their case at law, it being admitted that the case by which they are to succeed at law is the identical case by which they are to succeed in equity. And if a person will file a bill, he is, of course, exposed to the ordeal which the defendant may subject him to by filing a cross-bill; and he is then bound to set forth an answer to all the matter which concerns his title, for the truth of the matter which concerns his title is material to the defendant's defence in equity.

With respect to those allegations which relate to certain matters regarding the plaintiffs' title, I think that the defendant has a right to file a cross-bill to know whether they are true or false; and though it may seem to be immaterial to ask whether the count had been de-

livered, it is a question that leads to that which is material, namely, the truth or falsehood of the averments in the count.

With respect to the objection that Mr. Lowndes has prayed that Mr. and Mrs. Davies may elect whether they will proceed at law or in equity, although it is usual to obtain an order for that purpose on motion, yet in this case Mr. Lowndes appears to have a manifest advantage in allowing the original suit to go on to a hearing, and then to put the plaintiffs in that suit to their election. And I am of opinion that this relief which the plaintiff in this suit seeks, is a relief which he is *prima facie* entitled to have, and therefore that the demurrer must be overruled.

HARDMAN *v.* ELLAMES.

BEFORE SIR C. C. PEPYS, M. R. DECEMBER 22, 23, AND 24, 1834.

BEFORE SIR L. SHADWELL AND SIR J. B. BOSANQUET, LORDS COMMISSIONERS, MAY 2, 3, AND 9, 1835.

[*Reported in* 2 *Mylne & Keen*, 745.]

THE pleas in this case having been overruled,[1] the defendant Ellames put in his answer. The answer commenced by setting out the defendant's own title; for that purpose it stated four several fines *sur conusance de droit come ceo*, &c., levied of the estates in question in the cause, and it also stated the effect of the several deeds declaring the uses of the fines. The statement concluded in these words, "as by the said several fines, and the proclamations made thereon respectively now remaining of record in the said court, and by the said several deeds hereinbefore mentioned, to which for greater certainty the defendant craves leave to refer when produced, will appear."

These deeds were, with a number of others, enumerated in the third schedule to the answer, which admitted that all the deeds and documents mentioned in the schedule were in the defendant's possession.

In a subsequent and distinct part of the answer directed to the case set up by the bill, the defendant denied that the said fines or any of them were or was declared to enure to any uses under which the plaintiff, as heir-at-law of the testator, supposing him to be such heir-at-law, was entitled to a moiety of the estates or any other part thereof; and he further denied that the said documents and writings, or any of them, or any documents which were then or had been in his possession or power, or which he had then or ever had access to, did contain recitals or references showing the truth of the several matters in the bill mentioned or any of them, save in so far as the same were thereinbefore admitted to be true, or particularly showing the truth of the several matters in the said bill stated as to the said plaintiff's pedigree or any of them; and he further said that the said documents related to

[1] See *ante*, p. 100. — ED.

and made out his the defendant's title to the estates and premises so purchased by him as aforesaid, and did not, according to the best of the information and belief of the defendant, show or tend to show any title in the said plaintiff thereto, or to any part thereof.

A motion was now made that the defendant Ellames might produce, and leave with his clerk in court for the plaintiff's inspection, the several deeds before mentioned, declaring the uses of the aforesaid fines respectively.

Mr. *Pemberton* and Mr. *Jacob*, for the motion, relied upon the passage in the answer, referring for the defendant's greater certainty to the said several deeds when produced. That reference had the effect of making the instruments in question substantially a part of the answer by incorporating them with it, and the plaintiff was of course entitled to see the whole of the answer. Evans *v.* Richard;[1] Atkyns *v.* Wright;[2] Marsh *v.* Sibbald.[3] The mere denial by the defendant of the plaintiff's title could be no ground for refusing the production. Evans *v.* Richard; Unsworth *v.* Woodcock.[4]

Mr. *Bickersteth*, Mr. *Kindersley*, and Mr. *Booth*, contra, contended that as the plaintiff claimed by a paramount title as the right heir of the testator, while the defendant on the contrary alleged that two other persons were the heirs, and claimed under them; and as the deeds in question were expressly sworn to constitute the defendant's title, and in no way tended to make out or support the title of the plaintiff, no ground was laid on which an order for production could be justified. Lady Shaftesbury *v.* Arrowsmith;[5] Bolton *v.* Corporation of Liverpool.[6] In the latter of these cases, as appeared from the report, the very reference to the documents when produced, upon which reliance was now placed in support of the present application, was to be found in the defendant's answer; but although the motion had been most strenuously argued, it never occurred to any of the counsel employed in the cause that a reference of that description (which was a mere form thrown in as of course by every draftsman) could furnish even a plausible argument for claiming a production.

December 24.

The MASTER OF THE ROLLS made an order granting the application, on the ground that the defendant having by the words of reference incorporated the deeds in question with his answer so as to form a substantial part of it, the plaintiff was entitled to see every part of that answer.

[1] 1 Swanst. 7. [2] 14 Ves. 211. [3] 2 Ves. & Bea. 375.
[4] 3 Madd. 432. [5] 4 Ves. 66. [6] 3 Sim. 467; 1 Myl. & K. 88.

May 2 and 3, 1835.

An appeal motion was now made before the Lords Commissioners against the foregoing order.

Mr. *Kindersley*, Mr. *Wigram*, and Mr. *Booth*, for the appeal. The general rule is indisputable that a plaintiff has no right to require the production of any document, admitted to be in the defendant's hands, which would afford discovery of any thing but that which may assist in making out his own title. To justify an order for production, the plaintiff must show, if not an exclusive, at all events a common interest in the instruments sought to be produced. This rule, originally established upon demurrer, has been since acted upon under every variety of circumstances and in every stage of proceedings, and has now become imperative and unalterable. Ivy *v.* Kekewick;[1] Glegg *v.* Legh;[2] Wilson *v.* Forster;[3] Lady Shaftesbury *v.* Arrowsmith;[4] Buden *v.* Dore;[5] Burton *v.* Neville;[6] Sampson *v.* Swettenham;[7] Firkins *v.* Lowe;[8] Tomlinson *v.* Lymer;[9] Tyler *v.* Drayton;[10] Bolton *v.* Corporation of Liverpool.[11] Now, although the documents of which production is here sought are admitted to be in the defendant's possession, the defendant has taken upon himself positively to swear (and his oath for this purpose must be conclusive) that they constitute his own title, and in no way tend to assist or make out the title of the plaintiff.

It is impossible, therefore, to maintain the order under appeal, unless it is to be held, according to the argument of the other side, and upon which the court below seems to have proceeded, that the passage in the answer following the general statement of the effect of the deeds, and referring for the defendant's greater certainty to the instruments themselves when produced, of itself entitles the plaintiff to their pro-

[1] 2 Ves. jun. 679. [July 27, 1795. "The bill stated that the testator had, after the execution of his will, contracted for the purchase of an estate; which purchase was completed by his executor Kekewick, who conveyed to his son; and that they are, or one of them is, in possession; that the plaintiff is heir *ex parte materna*, and that there is no heir *ex parte paterna*. The defendant Kekewick, by his answer, claimed as heir *ex parte paterna*. The plaintiff, by the amended bill, prayed that the defendant might set forth in what manner he is heir *ex parte paterna*, and all the particulars of the pedigree, and the times and places or particulars of the births, baptisms, marriages, deaths, or burials of all the persons who shall be therein named. To this part of the amended bill the defendant demurred.

"Lord Chancellor [Loughborough]. This is a fishing bill, to know how a man makes out his title as heir. He is to make it out; but he has no business to tell the plaintiff how he is to make it out." *Allow the demurrer.* — Ed.]

[2] 4 Madd. 198.
[3] 1 Younge, 280.
[4] 4 Ves. 66.
[5] 2 Ves. sen. 445.
[6] 2 Cox, 242.
[7] 5 Madd. 16.
[8] 1 Macl. 73; 13 Price, 198.
[9] 2 Sim. 489
[10] 2 Sim. & Stu. 309.
[11] 3 Sim. 467; 1 Myl. & K. 88.

duction, independently altogether of the question how far he may have any interest in them, and even although they may be the very title-deeds on which the defence is rested. Such a proposition is equally opposed to principle and unsupported by authority. The words of reference occur not in that part of the answer which is addressed to the interrogatories founded upon the case made by the plaintiff's bill, but in a subsequent and totally distinct part, where the defendant is setting out his own title, and stating these documents as forming an integral part of it. They are, moreover, the mere common form thrown in by the draftsman as of course whenever there is occasion to specify or refer to instruments upon which the party means to rely at the hearing; and they are obviously inserted not for the purpose of informing the plaintiff that he may call for a production to which he would not be entitled otherwise, but solely for the protection of the defendant himself, to guard him against being prejudiced, should it afterwards appear that he has through ignorance or inadvertence stated the effect of the documents incorrectly. That such is their sole object and effect was expressly stated by Lord Lyndhurst in the very recent case of Sparke *v.* Montriou[1] in the Exchequer, a case from which it is clearly to be collected that the mere circumstance of a defendant incorporating a deed in his answer, either by referring to it as specified in a schedule annexed, or by referring to it for greater certainty when produced (and the answer there, as here, contains both species of reference), is no ground for compelling its production, if in other respects such compulsion would be inequitable. Sparke *v.* Montriou is, therefore, an express authority against the present order.

The cases upon which the order is attempted to be supported do not, when closely examined, bear out the proposition they are cited to establish. In Atkyns *v.* Wright the language ascribed to Lord Eldon appears somewhat equivocal; but the judgment shows plainly that his Lordship never conceived that the statement of the deeds, and an admission that they were in the defendant's possession, coupled with a reference to them in the common form for greater certainty when produced, constituted of themselves an absolute ground for ordering their production; for though all these circumstances concurred in that case, his Lordship refused the application. So in The Princess of Wales *v.* The Earl of Liverpool,[2] Lord Eldon, after observing upon Lord Talbot's decision in Bettison *v.* Farringdon,[3] where the production of a deed was ordered simply on the ground that it was referred to in the answer, says that the "later decisions seem to have established that it is not the mere reference that makes the documents part of the answer

[1] 1 Younge & Coll. 108. [2] 1 Swanst. 114. [3] 8 P. Wms. 868.

for the purpose of production."[1] And this may be considered as Lord Eldon's deliberate statement of what was the practice in his time.

In Bolton *v.* The Corporation of Liverpool, where the documents were referred to when produced nearly in the same terms as are used here, and they were also stated in a schedule to be taken as part of the answer, every argument which ingenuity could suggest was resorted to for the purpose of obtaining the desired production; but it never occurred to the plaintiff's counsel (of whom the present Master of the Rolls was the leader) that any plausible reason in favor of the motion could be founded on the language of the reference. If the rule now contended for be established, that a reference of this description to deeds in a defendant's custody of itself gives the plaintiff an absolute right to inspect them, there is no case whatever in which production may not be obtained; for a plaintiff has only to amend his bill by inserting a charge that the defendant has deeds in his custody forming part of his title, and on which he means to rely as part of his case at the hearing, and the admission in the answer extorted by the corresponding interrogatory will be a ground for enforcing the production. The monstrous consequences of such a practice are sufficiently apparent.

Mr. *Jacob* and Mr. *G. Richards*, contra. There are three cases in which the court orders a defendant to produce for the plaintiff's inspection documents admitted by the answer to be in his possession: first, where the bill charges and the answer admits that the plaintiff, either solely or jointly, has an interest in the documents; secondly, with a view to discovery, where they are or may be material to support the case made by the bill; and, thirdly, where, as in the present case, they are by a special reference incorporated with the answer so as to form substantially a part of it. A reference of this kind at once puts an end to any question whether the documents sought do or do not constitute the defendant's title; for by taking upon himself to state the effect of them in his answer, and referring to them for greater certainty when produced, the defendant expressly waives any objection to their production founded upon that circumstance; he does what amounts to exactly the same thing as if he had set them out *in hæc verba*. He reserves to himself, notwithstanding the brief statement he gives of them, the right to have the full benefit of every part of them at the hearing; and if he is to have the benefit of such a reservation, so in common fairness must the plaintiff. The plaintiff, therefore, who is entitled to see his adversary's whole case fully stated upon the plead-

[1] P. 121.

ings, has a right to have the documents on which the defendant means to rely set out at large, or, what is the same thing, to have them produced for his inspection.

The object of this appeal is really to ask that so many pages of the answer may be sealed up or struck out. It is incorrect to say that the words of special reference here used are mere words of course; so far from it, every experienced draftsman takes care to insert them only where there can be no objection either to produce the documents themselves, or to set them out at large if required, and the order under appeal is in strict conformity not only with the language and practice of the earlier judges, but with the authority of Lord Eldon himself. In Herbert *v.* The Dean and Chapter of Westminster,[1] Lord Macclesfield, upon the motion that the plaintiffs should produce vestry-books before a Master, observes, "Since they in their answer to the cross-bill refer thereto, and by that means make them part of their answer, referring to them, as it is said, for fear of a mistake, for that reason the court ought to let the defendants see them, otherwise there would be no relying upon the answer of those who are thus guarding themselves by references for fear of a mistake, and to avoid exceptions to their answer." So in Bettison *v.* Farringdon, Lord Chancellor Talbot ordered the production of recovery deeds, by which the estate of the plaintiff as a remainder-man in trust was barred, on the ground that the defendants, who claimed under those deeds, had, by "referring to them in their answer, made them part thereof." In Evans *v.* Richard,[2] Lord Eldon expressly laid down and acted upon the same principle, which indeed he had previously recognized in Atkyns *v.* Wright[3] and Marsh *v.* Sibbald.[4] In The Princess of Wales's case the bill stated the documents and referred to them, but did not say that they were in the plaintiff's possession; and the observation of Lord Eldon, relied upon by the other side, is addressed to that difficulty, a reference to documents when produced, as his Lordship stated the modern practice, not amounting to an admission that they are in the possession of the party. Aston *v.* Lord Exeter;[5] Hylton *v.* Morgan.[6] The case of Sparkes *v.* Montriou in the Exchequer was very peculiar in its circumstances; and the order, which is singularly framed, could not have been made, consistently with the practice, in this court. In Bolton *v.* The Corporation of Liverpool, the question was not raised, the argument having apparently been overlooked.

Mr. *Kindersley*, in reply, observed that when the reports spoke of deeds "referred to" by the answer, the expression meant no more than "mentioned" or "stated," and did not apply to the special reference to

[1] 1 P. Wms. 773. [2] 1 Swanst. 7. [3] 14 Ves. 211.
[4] 2 Ves. & Bea. 875. [5] 6 Ves. 288. [6] 6 Ves. 293.

them when produced, upon which the present motion was grounded. Sampson v. Swettenham.[1] Nobody had heretofore imagined that a reference of that description, which, notwithstanding what had been urged, was certainly thrown in by the draftsman as a mere phrase of course, could give the plaintiff a right to a production which the defendant would otherwise have been entitled to withhold; and there could not be a doubt that, if a search were made in the proper office, it would be found on examining the pleadings that in every one of the cases in which production had been refused, similar words to those now relied on were introduced in the answers.[2]

May 9.

LORD COMMISSIONER SHADWELL delivered the judgment of the court.

The object of the present application is to discharge an order made by the Master of the Rolls upon the defendant for the production of

[1] 5 Madd. 16.

[2] The following paper was afterwards handed in to the court, as the result of a search directed by the Lords Commissioners, as to the form of words of reference in answers:—

Evans v. Richard, 1 Swanst. 7. Defendant saith that in the schedule marked C to this his answer annexed, which he prays may be taken as part thereof, he hath set forth a full and true list or schedule of all and every books, letters, copies of letters, &c., relating to the matters, &c., which now or ever were, &c., in the possession, &c., of defendant.

There is a submission as to whether books in daily use should be produced, but not as to the letters, &c.

After setting out the letters, there are the following general words: "Defendant, for his greater certainty as to the purport and effect thereof, craves leave to refer to the same when produced," &c.

Sampson v. Swettenham, 5 Madd. 16. Indentures fully abstracted.

General words at conclusion of stating deeds, "as in and by the said indentures when produced, &c., will appear;" and "as by reference thereunto had will appear."

An admission "of custody and possession, &c., set forth in the schedule to answer annexed, and which defendants pray may be taken as part thereof."

There does not appear to be any submission to the court as to whether deeds ought to be produced, &c.

Tyler v. Drayton, 2 Sim. & Stu. 309. Indentures fully set out, showing title, &c.

General words at conclusion, "craves leave to refer when produced," &c.; but no prayer that they may be taken as part of answer.

Admission of custody and possession and schedule.

Defendant submits he ought not to produce, &c.

Marsh v. Sibbald, 2 Ves. & B. 375. Cannot be found.

Roper v. Roper, before the Vice-Chancellor, afterwards affirmed on appeal, and in which production was refused, the defendants referred to the instruments in the usual way.

Bolton v. The Corporation of Liverpool, 3 Sim. 467. The same as the preceding case.

certain indentures admitted by the defendant to be in his possession. The defendant has by his answer in part set forth the deeds in question, which are comprised in a schedule annexed to the answer, as being documents in his possession, and he has for greater certainty craved leave to refer to the indentures themselves when produced. If by so doing the defendant has made the indentures a part of his answer, it seems to follow as a necessary consequence that the plaintiff, having a right to read the whole of the defendant's answer, has a right to read the documents so made a part of his answer.

The question which arises in this case has been involved in some confusion on account of its having been mixed up with questions of a different kind. There are three cases which may arise: the documents may not be referred to, but they may be admitted to be in the defendant's possession; they may be referred to, and not admitted to be in the defendant's possession; or they may be in part set forth or shortly stated in the answer, and referred to, as in the present case, for the defendant's greater certainty when produced.

Where the documents are not referred to, but are admitted to be in the defendant's possession, there the question whether the defendant shall produce them or not is determined by considering whether the documents do or do not relate to the title of the plaintiff. If they relate solely to the title of the defendant, in that case the order for production is not made; this appears from the case of Bligh *v.* Benson;[1] on the other hand, if they are material to the plaintiff's case, the court will order their production, as in the case of Firkins *v.* Lowe.[2] In both of those cases the documents were admitted to be in the defendant's possession, and in neither of them were the documents so referred to as to be made part of the defendant's answer. In Burton *v.* Neville,[3] where the plaintiff claimed under a settlement and the defendant under recoveries, and the defendant admitted the deeds to be in his possession, but did not submit to produce them, a motion for their production was refused, the Lord Chancellor observing that plaintiffs could only call for those papers in which they had shown that they had a common interest with the defendant.

Secondly, in the case where the documents are referred to and not admitted to be in the defendant's possession, it is perfectly clear that the court cannot order production unless it turns out that the documents stated not to be in the possession of the defendant happen to be in the hands of some person over whom the defendant evidently has control. Thus, in the case of Darwin *v.* Clarke,[4] where the answer admitted the execution of an instrument, but did not admit it to be in the defend-

[1] 7 Price, 205.
[2] 18 Price, 193.
[3] 2 Cox, 242.
[4] 8 Ves. 158.

ant's possession, custody, or power, the motion for production was refused.

A third class of cases is where the contents of instruments are in part stated in the answer, and referred to for greater certainty. In Atkyns *v.* Wright,[1] a motion was made for the production of a document which appeared to be in the possession of the defendant Graham, and Lord Eldon was of opinion, under the particular circumstances of that case, that the plaintiff could not compel the production of the deed, but he observes, that where a defendant had in a great measure set forth the contents of an instrument, and for the truth of what he set forth referred to the instrument, there was no question of production, as he made the instrument part of his answer. This appears from the case of Herbert *v.* The Dean and Chapter of Westminster,[2] where Lord Macclesfield says, that "as to the motion that the plaintiffs should produce the vestry-books before a Master, since they in their answer to a cross-bill refer thereto, and by that means make them part of their answer, referring to them (as it is said) for fear of a mistake, for that reason the court ought to let the defendants see them." So in Bettison *v.* Farringdon,[3] Lord Talbot says, "the defendants, by referring to the deeds in their answer, have made them part thereof." There is a query in the note to that case, whether the bare referring to a deed, without setting it forth in *hæc verba*, will make it part of the answer, and Hodson *v.* The Earl of Warrington in the same book is referred to; but I may take this opportunity of observing that the cases in the third volume of Peere Williams are not of equal authority with those in the two preceding volumes, which were published in his lifetime. In Marsh *v.* Sibbald,[4] Lord Eldon says that every book, letter, memorandum, &c., referred to by the answer is a part of the answer; and in Evans *v.* Richard [5] the same learned judge says, that when the court orders letters and papers to be produced, it proceeds upon the principle that those documents are by reference incorporated in the answer and become a part of it.

It appears, therefore, upon a review of the cases, to be perfectly settled that where a defendant in his answer states a document shortly or partially, and for the sake of greater caution refers to the document in order to show that the effect of the document has been accurately stated, in such a case the court will order the document to be produced. It was said, in the present case, that the document ought not to be produced, because it only manifests the defendant's title; but the answer to that is, in the first place, that it may by possibility do some-

[1] 14 Ves. 211.
[2] 1 P. Wms. 773.
[3] 3 P. Wms. 363.
[4] 2 Ves. & Bea. 375.
[5] 1 Swanst. 7.

thing more than merely manifest the defendant's title. It would be a strange thing to say that the defendant should, at the hearing, have the advantage of other parts of the deed than those set forth in the answer, and that the plaintiff, who looks to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice that, if the defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right, at the hearing, to read such parts of the defendant's answer as he thinks fit. It is to be observed, also, that if the plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth.

BELLWOOD v. WETHERELL.

BEFORE LORD ABINGER, C. B. JANUARY 15 AND 28, AND MARCH 2, 1835.

[*Reported in* 1 *Younge & Collyer*, 211.]

THE defendant in this suit, as lay impropriator of the rectory of Osmotherley, in the county of York, in Trinity term, 1833, filed his bill against the present plaintiffs and others for an account of tithes for lands in their respective occupations within the said parish.

The present was a cross-bill filed for the purpose of obtaining a discovery of the defendant's title. It alleged that the defendant was only a portionist of some tithes arising upon certain lands within the parish of Osmotherley, and not the impropriate rector of such parish. It likewise alleged that the first conveyance under which the defendant claimed title, and which the bill charged to be in his possession, and which bore date, &c., did not contain certain lands for which he claimed tithes, although in subsequent conveyances, which were likewise in his possession, those lands had been preserved with a view to give the persons claiming under the same an apparent or valuable title to the said rectory.

The bill contained charges on which the following inquiry was founded: "Whether the said Benjamin John Wetherell is in any and what manner, or under any and what deeds or deed, entitled to the tithes which he is seeking to recover by his said bill against the plaintiffs. And that the said Benjamin John Wetherell may discover and set forth what tithes within the said parish of Osmotherley he is seised of or entitled to, and how and in what manner and in what capacity he is seised of or entitled to the same, and under what deeds or deed, and the dates or date of such deeds or deed, particularly the dates or date of the first deeds or deed, under which he alleges the said rectory was conveyed to the person or persons under whom he claims such rectory."

The defendant by his answer denied that he was only a portionist. He said that one John Weighill had formerly the said rectory duly

conveyed to him, or by other good and lawful means became the lay impropriator thereof. That he, the defendant, claimed to be entitled to all the tithes, both great and small, within the township of Osmotherley, excepting from such lands the tithes whereof had been sold off, but which lands were not in the occupation of any of the plaintiffs. That he, the defendant, was the impropriate rector of the said parish, and that he derived title to the tithes aforesaid under the said John Weighill. With respect to the foregoing inquiry, his answer was as follows: "That he is in manner hereinbefore, and in his said former answer mentioned, entitled to the tithes which he is seeking to recover by his said bills. And he insists and submits that said plaintiffs are not entitled to be informed under what deeds or deed, or the dates or date of such deeds or deed, particularly the dates or date of the first deeds or deed under which he alleges the said rectory was conveyed to the person or persons under whom this defendant claims the said rectory."

The plaintiff took exceptions to the answer for insufficiency.

Mr. *Barber* and Mr. *Bayley*, for the exceptions. This is a cross-bill filed for the discovery of deeds, in order to prove the allegation that the plaintiff in the original suit is only a portionist. A similar course was taken in Bowman *v.* Lygon,[1] where the demurrer to the cross-bill was overruled. Metcalfe *v.* Harvey [2] and Moodalay *v.* The East India Company [3] are authorities in favor of the plaintiff. The former of these cases is very strong. There Lord Hardwicke laid it down that a person in possession of an estate might file a bill to discover the title of a person bringing ejectment against him. No doubt the general rule is, that where a man as plaintiff files an original bill to establish his title, he may call for deeds which show his own title, but not those which would discover the title of the defendant. That position is not disputed. But where a man is defendant, the case is different. If a person is brought into a court of equity, he has a right to call on the person who brings him there to discover his title, because it is by way of defence. You may, by a bill of discovery, make a plaintiff a witness against himself. In aid of a defence, a discovery will be enforced even though the party compelled to make it may be made liable to penalties in consequence. Bishop of London *v.* Fytche;[4] Macauley *v.* Shackell.[5] It is the constant practice of underwriters, when sued on a policy which they believe to be affected with fraud, to file a bill for discovery against the plaintiffs at law, although the discovery might subject the parties to an indictment or penalties.

[1] 1 Anstr. 1. [2] 1 Ves. sen. 249. [3] 1 Bro. C. C. 468.
[4] 1 Bro. C. C. 96. [5] 1 Bligh, N. s. 96.

Mr. *G. Richards*, contra. The plaintiff is not entitled to the production of these deeds, and the principle is the same either on a cross-bill or an original bill. Where the defendant admits that he has deeds which make out the plaintiff's title, the court will order them to be produced. But the court will not order their production in this case, for the defendant has admitted deeds which relate to the rector's title only. In Bowman *v.* Lygon[1] the demurrer was overruled, because, as Thompson, B., observed, it covered too much. In the same case, Eyre, B., said that the rule as laid down by Lord Hardwicke went much too far, but that in the case before him the demurrer was overruled on other grounds. It is impossible to deny that Lord Hardwicke's is a dangerous decision. In the case of underwriters, the admission of fraud on the part of the defendant makes out the case of the plaintiff. [The LORD CHIEF BARON. The defendant puts your title in issue. Suppose that, upon the hearing, you, having shown no previous title in answer to the bill, should succeed, you would be entitled to a decree; but that would be no answer to the real rector who afterwards filed his bill. You say that defendants who are underwriters may file a bill of discovery, whatever be the consequence to the plaintiff. Does not that apply here? Is it not essential that the defendants should know whether the plaintiff is really rector, in order to be guarded against a suit by another person?] In Glegg *v.* Legh[2] the same point was agitated as in the present case, and the discovery was refused. Parker *v.* Legh[3] was a decision to the same effect. Sampson *v.* Swettenham;[4] Collins *v.* Gresly;[5] Bligh *v.* Benson.[6]

Mr. *Barber*, in reply. Except the case in Maddock, the cases cited have no application. The parties were plaintiffs, and filed their bills for the recovery of tithes. But here you bring the defendant into equity against his will. He then referred to Mitford on Pleading, 53, 54.

Mr. *Simpkinson*, *amicus curiæ*, said that since Glegg *v.* Legh was decided, Sir John Leach had in a similar case decided otherwise, and had overruled the demurrer.

January 28.

On a subsequent day, Mr. *Simpkinson* said that his remark on a former occasion was corroborated by the decisions in Glegg *v.* Legh[7] and Cherry *v.* Legh,[8] in the House of Lords, in which cases answers were put in. He also referred to Attorney-General *v.* Davison.[9]

[1] 1 Anstr. 1. [2] 4 Madd. 198. [3] 4 Madd. 207.
[4] 5 Madd. 16. [5] 2 Y. & J. 490. [6] 7 Price, 205.
[7] 1 Bligh, N. S. 302. [8] 1 Bligh, N. S. 306. [9] 1 M'Clel. & Y. 160.

Mr. *G. Richards*, for the defendant, referred to Bolton *v.* Corporation of Liverpool.[1]

March 2.

The Lord Chief Baron. These are exceptions to the answer to a cross-bill filed against a lay rector, the rector having filed his original bill for an account of tithes. The defendant in the original suit puts the plaintiff's title in issue in his answer, and then files his cross-bill against the plaintiff for a discovery of his title, disputing his title as rector, alleging that he is only a portionist, and not the rector generally; he does not, however, suggest that anybody else is rector, or that anybody else is entitled. These exceptions are taken to the answer, because the rector does not set forth his title in manner required by the bill. The question, therefore, is this, whether the rector under the circumstances is bound to disclose the evidence of his title? Upon looking at the cases, some of them appear extremely embarrassed and contradictory, and no steady principle is adopted in them. The case which appears at first to be most in point is that of Bowman *v.* Lygon,[2] but it does not furnish a precise decision on the subject. That was a bill filed by a rector for tithes; the rector's title was put in issue, and a cross-bill was filed, seeking a discovery of the rector's title, and whether he had received any agistment tithe. The demurrer was to both these points. The principle was there recognized that, as a general proposition, a man should not be obliged to discover his title; but the same distinction was attempted to be established in that case as in the present, one of the counsel arguing, that where a person is defendant to an original bill, he is entitled in all cases to a discovery of the plaintiff's title. I cannot accede to that. The judgment in that case was no doubt correct, because the demurrer covered too much. Mr. Baron Thompson, a most consummate judge both in law and in equity, proceeded with his usual caution on that occasion, and avoided coming to any decision on a point not in question. He held the demurrer bad, for the reason I have stated, but gave no opinion upon the other point; a reserve which would have been wholly unnecessary, if he had thought it perfectly clear and indisputable. Then Lord Chief Baron Eyre, a person of great accuracy, though not always so cautious in delivering his opinions as Mr. Baron Thompson, throws out an observation which qualifies the general proposition. He seems to consider that nothing but some pressing matter arising in the particular suit would justify the discovery. He says it is difficult to draw a line in what cases discovery ought to be granted, as where the ten-

[1] 8 Sim. 467; 1 Myl. & K. 88. [2] 1 Anstr. 1.

ant is fearful of being harassed by different claimants of the impropriation. Now the obvious line to be drawn is this, that though in general the defendant has no right to a discovery of the plaintiff's title, yet in certain cases he will be entitled to a discovery of the nature, though not of the evidence, of that title. Thus, where a party file a bill as rector, the defendant may file a cross-bill, to see whether the plaintiff in the original suit is entitled to have that which he admits may be due to somebody. The defendant may allege that some other person is entitled, and in such case he may file his bill of interpleader. If he does not go that length, he may suggest that he has had notice that some other person is entitled paramount to the plaintiff, or that the plaintiff has parted with his right to the tithes; and in such case, though there is no ground whatever to make the party disclose the evidence of his title, still there is ground to call on the party to discover the nature of his title, so that the defendant shall not be harassed a second time. That would apply to several cases; as, for instance, if the defendant to an original suit had established a modus, and it then turned out that the plaintiff had parted with his interest, a person claiming by a paramount title might say that he was not bound by that decision. It is clear that in such case the defendant would have a claim to discovery of the nature of the plaintiff's title, in order to protect himself in that particular payment.

The distinction to be taken in cases of this nature was recognized in those cases of Glegg *v.* Legh [1] and Cherry *v.* Legh,[2] in the House of Lords. In the former case the plaintiff filed his bill as rector for the recovery of tithes. The answer denied the plaintiff's title as rector, and then a cross-bill was filed; and the cross-bill must have been suggested by that which appeared in the answer. At that time the rectory was vested in two trustees of a term for securing certain annuities, and also in a mortgagee. Now this bill was filed in 1817, and the cross-bill was filed the following year; and I find by the report in Cherry *v.* Legh that the bill against Cherry was not filed till 1820, which was after the answer was put in to the bill filed by Glegg and the other parties; and in this last bill Egerton and Tatton, the trustees of the term, were made plaintiffs. That was not so in the original bill filed by Glegg. When this last case came to be tried in the Exchequer, two defences were set up, one of which was a denial of the plaintiff's title as rector; and this court decreed, notwithstanding the trustees were in possession of the term for securing the incumbrancers, and notwithstanding the mortgagee had the legal title, yet, as all the annuities had been paid up to the time when the bill was filed, and

[1] 1 Bligh, N. S. 302 [2] Ib. 306.

as the mortgagee had been paid all his interest, that was a sufficient protection to the defendant, because he could not be called on again by the trustees or mortgagees, and, therefore, he was bound to account. That decree was confirmed by the House of Lords, and the very opinion of Lord Eldon on the hearing of the appeal shows what was the object of the discovery claimed by the cross-bill; and it appears clear that he thought there was a distinction to be drawn in these cases, and that it does not follow that if a plaintiff files a bill claiming tithes, that gives the defendant the right to file a bill to obtain from the plaintiff the evidence of his title.

It was said, indeed, by the counsel who supported the exceptions, that where a party is brought into equity as a defendant, he is in a different situation from a party seeking discovery as a plaintiff, and that he has a right to file a cross-bill to obtain the discovery necessary for his defence; and in support of that position, the case is adduced where a defendant attacked by an ejectment files a bill of discovery. But the observation to be made as to that is simply this: where a party is in possession of an estate, and a perfect stranger comes to turn him out, alleging himself to be the person entitled, it is but reasonable that the party so attacked should have an opportunity of knowing the plaintiff's case; so far as whether he claims as heir-at-law, whether he claims under a devise, or whether he alleges any imperfection in the defendant's title-deeds. There the defendant is taken by surprise, and therefore I can easily understand in such a case why, not the evidence, but the nature of the title, should be disclosed. But in cases of recent possession, where parties well know the nature of each other's titles, there is no ground to compel any such discovery as that which is here required. That appears to me to be an answer to the argument derived from the cases of ejectment.

There is another case which it is necessary to notice, — Moodalay *v.* East India Company.[1] That was a case where a party in the East Indies held under the company by what is called a cowl. He had been dispossessed by order of the company, and he was desirous of bringing an action to vindicate his right, and he filed his bill against the company for a discovery of the circumstances under which they had granted another cowl, and to know by what authority they had dismissed him. The Master of the Rolls in his judgment says, the company are bound to answer; but the question in that case was, whether the case were within the given limits within which suits will be entertained by courts of equity against the company; that was the main point decided, and upon that the Master of the Rolls was against

[1] 1 Bro. C. C. 468.

the company. As to the other point, he said they should not be prejudiced by discovering their title; so that in fact that point was not decided; and therefore the case, as regards the present question, is not an authority.

There is, undoubtedly, a recent case of Bolton v. The Corporation of Liverpool,[1] where, upon a bill filed for the discovery of documents affecting the right of the corporation to demand toll, the Court of Chancery ordered the defendants to produce certain cases which had been laid before counsel relating to the subject in dispute, those cases not having been prepared with reference to the existing proceedings. I confess I do not think that decision was warranted by the cases which were made the foundation of it. I should have decided it differently, and should not have allowed the production of those documents; at the same time, where a corporation claims a toll to be due from the inhabitants of a town, then I think it would be both expedient and just, not that the evidence of their title, but that the nature of their claim, should be discovered.

The plaintiff in this suit does not suggest upon his bill any doubt whether he may not be put to additional expense, and be harassed again by some person claiming a paramount title to the rectory. He simply says that the defendant is not rector; and that brings it to the naked question, — shall he be allowed to call on the defendant to produce a deed, not because it makes out his own case, not to defend himself, but to expose the plaintiff to all the dangers of a discovery? The possession of the rector, without any adverse claimant, is *prima facie* evidence of his title; and if in any document to be so produced a flaw should happen to be found, it would be a summary means to deprive the rector of his right, if that deed were exposed in a court of equity, where other persons might take advantage of the defect. At law, the rector must prove his title as in any other case, and the defendant might take advantage of any imperfection; but to allow such an application as the present, would be to enable the defendant in a tithe suit in every case to call on the plaintiff to produce the particulars of his title. The case by which the general rule is entrenched upon, and which forms an exception to the rule, is where it is expedient that the defendant should be protected from any adverse right set up by a paramount claimant, and from agitating the matter over again. *Exceptions overruled.*

[1] 3 Sim. 467; 1 Myl. & K. 88.

KNIGHT v. MARQUESS OF WATERFORD AND OTHERS.

BEFORE LORD ABINGER, C. B. DECEMBER 14, 1835.

[*Reported in* 2 *Younge & Collyer*, 22.]

THE plaintiff was rector of the parish of Ford, in the county of Northumberland, and the Marquess of Waterford was patron of the rectory of Ford, and also lord of the manor of Ford, and an owner and occupier of land within the rectory.

In the year 1830 the plaintiff filed his bill in this court against the Marquess of Waterford, and several other persons his tenants, being occupiers within the rectory of Ford, for an account and payment of the great and small tithes of the land in their several occupations. To that bill the marquess, who was then a minor, put in an answer by his guardian, stating his belief that the manor of Ford, containing eight thousand acres, had been from time immemorial comprised within the parish of Ford, and that there had been payable from time immemorial by the lord or owner of that manor for the time being, by equal half-yearly payments, to the parson of the parish of Ford for the time being, the yearly sum of £40 for the maintenance of divine worship there, in lieu of all manner of tithes arising, &c., within the manor of Ford; and that the lord or owner of that manor for the time being, or his assigns, had from time immemorial been entitled in respect of the said yearly sum of £40 to all the tithes within that manor, or any part thereof. The defendant made no answer to a charge contained in the bill as to deeds and documents in his custody.

The Marquess of Waterford having come of age, the plaintiff filed a supplemental bill of discovery against him and the other defendants, suggesting that the lords of the manor of Ford, who were patrons of the rectory, and under whom the defendant, the Marquess of Waterford, claimed, used to take bonds from persons about to be presented to the rectory, conditioned for the acceptance of an annual sum of £40, in satisfaction of the tithes within the manor of Ford; that when no such bonds were given, the rectors, soon after their induction, used to make leases of those tithes to the lords of that manor, and that £40 a year, or some such annual sum, was the rent reserved on such

leases; that at all events, by some instruments or agreements, the sum of £40 was fixed as the whole amount to be received by the rectors from the lords for the tithes within the manor of Ford or parish of Ford; and that the £40 alleged by the marquess to be an immemorial customary payment had its origin in such bonds and leases, or other instruments or agreements. The bill then contained other statements impeaching the defence to the original bill, namely, that about the year 1573 a claim was made and a suit instituted in respect of the tithes within the manor of Ford by the then rector against the then lord of the manor; that a decree was made referring the matters in dispute to arbitration, and that an award was made establishing the rector's right; that a considerable district, called Catford Law, formerly belonging to the lords of the manor of Ford, and being part and parcel of that manor, and held as such, was about the year 1660 sold by the then lord of the manor to a family of the name of Carr, and that the occupiers of that land had ever since paid tithes to the rectors of Ford; that another district, called Heatherslaw, situate within the parish of Ford, and forming part of lands for which the £40 was claimed to be paid in lieu of tithes, was formerly a manor of itself, and paid tithes in kind to the rector until purchased some time between 1685 and 1717 by the then lord of the manor, after which time the tithes of Heatherslaw were introduced into the leases, bonds, and other instruments, whereby the sum of £40 was received by the rectors of Ford in lieu of the tithes of the lands, the property of the lord of the manor of Ford.

The bill then alleged that the defendant, the Marquess of Waterford, had in his possession, custody, or power, divers of the before-mentioned bonds, leases, or other instruments and agreements, and also the before-mentioned award; and also divers old deeds, instruments, and writings, including the deeds of conveyance, or some of them, or some copy of or extract from or abstract of them, or some of them, proving the allegations in the bill respecting Catford Law and Heatherslaw; and also divers other deeds, papers, and writings, which would show that no such immemorial payment of £40 existed, or which would in some way tend to show the plaintiff's title to tithes in kind within the manor of Ford.

The marquess by his answer admitted that Catford Law formed part of the manor of Ford, and had been sold as stated by the bill, and that since such sale the occupiers of it had paid tithes to the rector; but he alleged that this was in order to avoid litigation. He stated that he had not in his possession the conveyance deeds of Catford Law, but that he had those of Heatherslaw, and that they were included in the second schedule to his answer. He denied the other material allegations of the bill. In answer to the general charge as to deeds

and documents, he alleged in substance as follows: That he hath in his possession divers deeds and evidences of title, papers, and writings relating to the tithes of the parish of Ford, but that such deeds, &c., all relate to his, the defendant's, title to the said manor or the lands therein, or the tithes thereof, and that the same do not relate to the plaintiff's title to any tithes whatever within the parish or manor; that he hath in the first part of the second schedule to his answer annexed, and which he prays may be taken as part thereof, set forth, according to the best of his knowledge, a full and true list and description of such deeds, &c., as are so in his possession; that he hath in the second part of the second schedule, &c., and which he prays, &c., set forth a full and true list and description of divers deeds, &c., which relate to the tithes of the said manor (but which are not in the defendant's possession or power, except that he or his agent may have an inspection thereof at his bankers'); that the deeds, &c., so deposited with his bankers, all relate to the defendant's title to the said manor or the lands therein, or to his right and title to the tithes of the said manor, and that the same do not relate to the plaintiff's title to any tithes whatever within the said parish, or within the said manor; that the plaintiff is not, as the defendant submits and insists, entitled to the production, either in this court or otherwise, of all or any of the deeds, evidences, papers, and writings comprised in either the first or second parts of the second schedule.

The answer then contained a denial that the defendant had ever had in his possession the bonds, leases, and other instruments inquired after by the bill, if any such ever existed; or save, as appeared by the second schedule, any papers or writings relating to the payment of £40, or any other sum in lieu of the tithes mentioned in the bill.

A motion was now made on behalf of the plaintiff for the production in the usual manner of the deeds and documents mentioned in the first part of the second schedule of the answer, and that the defendant might procure for the plaintiff an inspection of the deeds and documents mentioned in the second part of the second schedule.

Mr. *Boteler* and Mr. *Lowndes*, for the motion. The plaintiff cannot call upon the defendant for the production of such documents as constitute the defendant's title to the inheritance in the manor or the tithes, nor does he ask for the copies of public documents; he therefore confines his application to such documents as are collateral to the title, and not of a public nature. The cases establish that distinction. Firkins *v.* Lowe;[1] Collins *v.* Gresley;[2] Newton *v.* Beresford.[3] The plaintiff has a right to inspect these documents, and to submit to the court that the defendant's construction of them is wrong. He is not

[1] M'Cleland, 78. [2] 2 Younge & Jer. 490. [3] 1 Younge, 877.

bound to take the defendant's word that they speak only in favor of his own title. The right to the inspection is fully admitted by that passage of the answer which alleges "that, save as appears by the second schedule," the defendant has no documents relating to the matter in issue.

Mr. *Swanston* and Mr. *Purvis*, contra. The plaintiff has not shown upon the answer a sufficient title for the production of these documents. On the contrary, it is expressly denied by the answer that they relate to the plaintiff's title; and Bligh *v.* Benson [1] shows that the defendant's construction in this respect will be adopted by the court. That case was recognized in Hardman *v.* Ellames.[2] The plaintiff ought in general to show some interest in the documents he seeks to have produced; but here, as rector, he has a common-law title which cannot be affected by deeds and documents. In Sampson *v.* Swettenham,[3] Sir John Leach refused to order the production of a deed which gave the defendant title, but which was not connected with the plaintiff's title. [The LORD CHIEF BARON. The object here certainly is not to establish the plaintiff's title, but to impeach the defendant's.] There is no authority for this application. In two of the cases cited the motion was for the production of the vicar's books; but they are public documents which the tithe-payers have a right to inspect, in order to see what payments have been made by their ancestors. Glegg *v.* Legh [4] is an authority against the present motion, though the demurrer in that case was held to go too far, and was therefore overruled. [The LORD CHIEF BARON. But it appears from the Vice-Chancellor's observations in that case, that if the defendant had confessed by the demurrer that he had in his possession a copy of the deed by which he had conveyed the tithes to another person, that would have shown he had no title; and though the plaintiff could see nothing else, yet they might see, if they could get at it, the deed by which the defendant had conveyed his right away.]

Mr. *Boteler* replied, contending that the bill sufficiently charged that the defendant had documents in his possession which disproved his case, and that those charges were not met by an answer denying generally that the plaintiff had an interest in the documents.

The LORD CHIEF BARON. I have fluctuated much in my opinion in the course of the argument, because I wished to see if there was any case of a rector who had been able by a bill of discovery, or under the authority of this court, to compel a defendant to produce documents which did not in fact tend to advance the rector's title, but to defeat that of his antagonist. The case cited by Mr. Purvis, and decided in

[1] 7 Price, 205.
[2] 2 Myl. & K. 745.
[3] 5 Madd. 16.
[4] 4 Madd. 193.

the year 1819, was that of a rector's book. The bill was filed by a rector, and upon an application for that purpose the court refused to compel the defendant to produce the book of a former rector, which was supposed to have found its way into the hands of that rector's executors, and thence into the possession of the defendant. Now, if I considered the present case exactly like that, I should of course follow that precedent; but it strikes me, upon looking at the whole of this case, that the plaintiff is entitled to some discovery. The general rule in these cases is, that the defendant shall not be compelled to produce his own title-deeds, but that rule is very much confined to title-deeds relating to real property. I do not mean to say that title-deeds of tithes would not fall under that head; but in a case where the rector files his bill, and his *prima facie* title to the rectory is admitted, but the thing put in issue is whether his right to receive tithes in kind has been modified or defeated by some custom or conveyance in former time, and entitles him only to £40 a year, it cannot be denied that all the matter which establishes that must have a very great relation to his title. It is proposed to modify this motion so as to exempt all those deeds that appear upon the schedules to relate to the defendant's title to the manor, or to the lands, or to any title of inheritance, and to apply it only to those sorts of documents which are surmised by the bill to refer to certain contracts between the rectors and the patrons for the time being, under which the custom as to this £40 is said to have grown up. Now, if there be any documents in existence that would throw any light on the origin of that custom, and if at the same time I should say that the rector is not entitled to have a discovery of those documents, what would be the result? That on the hearing of the cause the defendant would not produce those documents, but only such as might prove the custom without any qualification. I think, therefore, that justice requires that the motion, as modified, should be granted. The mere opinion of the defendant that the documents do not relate to the plaintiff's title cannot alter the case, because it is quite clear they do relate to his title if they have relation to the tithes at all.

It was ordered that the defendant should within a given time produce, for the inspection of the plaintiff and his agents, the several deeds, evidences, papers, and writings mentioned and referred to in the first part of the second schedule of his answer, except the deeds, evidences, papers, and writings forming the title to the inheritance of the manor of Ford, and lands, the tithes of which are claimed to belong to the defendant, and except the deeds, evidences, papers, and writings forming the alleged title to the inheritance of such tithes, and except also the copies of documents in public courts or depositories for writings. Liberty to the plaintiff and his agents to take copies of or extracts from the documents so to be produced.

SPARKE v. MONTRIOU.

BEFORE LORD LYNDHURST, C. B. NOVEMBER 27, AND DECEMBER 1 AND 23, 1834.

[*Reported in* 1 *Younge & Collyer*, 108.]

IN this case two motions were made for the production of deeds and papers admitted by the answers of the defendants Montriou and Carvick respectively. The application in each case was that the defendant may be ordered to leave in the hands of his clerk in court the several deeds, documents, papers, and writings, admitted by his several answers filed in this cause, or the schedules thereto respectively, to be in his possession, custody, or power, and particularly certain indentures, &c.; and that the said several deeds, &c., may be produced at the hearing of this cause, or that the said defendant may be ordered to produce the said several deeds, &c., to the said plaintiff's solicitors, and to the examiner, for the purpose of proving the same, and at the hearing of this cause.

According to the statement in the bill, Richard Moore was indebted to Peter Firmin in the sum of £1200, secured by a judgment entered up in Trinity term, 1806. In 1810, Moore mortgaged certain real estates to Ezekiel Sparke for £1200. Afterwards Moore contracted to sell other estates of very considerable extent and value to W. L. Ogden, for which Ogden was to pay a large deposit. Ogden declining to pay the deposit without some security, Sparke, who was a friend of Moore, assigned his mortgage to Ogden for that purpose, under an agreement that, when the purchase was completed, the security should be reassigned. The deposit was accordingly paid. Ogden afterwards granted an annuity to one Allen, and assigned Sparke's mortgage to secure the annuity. Allen assigned to the defendant Carvick. In the mean time Sparke had obtained an assignment of Firmin's judgment. Before the completion of the contract for the sale of the real property, Ogden died, and all the interest of Moore in the premises was conveyed to the defendant Montriou upon trust, to carry the contract into execution with Ogden's representatives, or abandon it upon their receiving the difference of the purchase-money. Montriou entered into

an agreement with Ogden's representatives to rescind the contract, which was done. Moore and Sparke both died. Moore's real estates were purchased by Hart Logan. The bill was filed by the widow and personal representative of Sparke against the defendants Montriou and Carvick, Willoughby Moore, the son and heir-at-law of Moore, and Hart Logan, praying for the benefit of the judgment, and of Sparke's mortgage-deed; that Carvick's annuity might be paid off out of the purchase-money due from Hart Logan; that the lands covered with Sparke's mortgage might be reconveyed as a security for his mortgage-money, for an account of what was due to him for principal and interest, and payment of his debt.

Mr. *Wakefield* now moved for the production of the deeds by the defendant Montriou, observing that Montriou was a trustee for the plaintiff. The application was made in the alternative, either that the deeds might be produced at the hearing, or that they might be produced before the examiner, for the purpose of being proved. Proof of the deeds was what the plaintiff mainly required.

Mr. *O. Anderdon*, contra. The bill contains no charge as to the possession of deeds and documents, and no prayer for their production. The schedule is an answer to a different bill, the bill having been changed by amendment. The deeds are the title-deeds of the defendant himself. Some authority ought to be cited for the proposition, that because a person sets forth a schedule of deeds, they are, therefore, to be produced. If A. has title-deeds in which B. has an interest, B. ought to file his bill for their production, and not proceed by interlocutory application. Suppose one party states certain deeds as part of his own case, is the other party entitled to their production upon the mere allegation that the former party is a trustee?

Mr. *Wakefield*, in reply. Moore was a trustee for Sparke to the extent of Sparke's mortgage; and Moore's interest being now vested in Montriou, the latter is a trustee for the plaintiff. The contract between Moore and Ogden's representatives having been rescinded is no reason why Sparke's representative should be deprived of his mortgage-money. Sparke likewise was possessed of a judgment overriding all the securities. The plaintiff, therefore, has a *prima facie* case. The object of the motion is, that the deeds may be produced at the hearing, or proved before the examiner. The plaintiff is satisfied with the alternative; proof of the deeds is all that we require. The principle by which the court is guided in ordering the production of deeds is laid down by Lord Eldon in Evans *v.* Richard.[1] It depends on whether the deeds are by reference incorporated with the answer, and made part of it. Here the deeds are sufficiently incorporated with the

[1] 1 Swanst. 7.

answer. Those of the 11th and 12th February, 1811, the conveyance to Ogden, are set out and referred to in these terms: "As by the said indentures, reference being thereunto had, will more fully and at large appear." The conveyance to Montriou and other deeds are comprised in the schedule; and the schedule is expressly referred to in the answer. The answers show that the plaintiff has an interest in those deeds; and the court will not presume that the defendant has inserted in his schedule deeds in which the plaintiff has no interest. In Church *v.* Barclay,[1] the defendant Barclay admitted the possession of certain deeds; the cause came on to be heard, and the plaintiff failed. On appeal, the plaintiff had *prima facie* no case for the relief he sought, and yet production of the deeds was ordered. In Unsworth *v.* Woodcock[2] the defendant denied the plaintiff's case from beginning to end; yet that made no difference, and the order was made.

The LORD CHIEF BARON was of opinion that the defendant had by his reference to the deeds made them part of his answer, and that he was *prima facie* bound to produce them. There might be reasons for not producing them; but if so, it was incumbent on the defendant to show what those reasons were.

The order made was, that the defendant Montriou should furnish the plaintiff's solicitors with the names, descriptions, and residences of the attesting witnesses to the deeds, and that the deeds should be produced before the examiner to be proved, and at the hearing of the cause.

Mr. *Wakefield* then moved for the production or the proof of the deeds admitted by the answer of the defendant Carvick. Upon the occasion of Ogden's assigning Sparke's mortgage to Allen as a security for the annuity granted to Allen, the mortgage-deeds were deposited with Allen. Upon Allen's assignment they were deposited with Carvick. These and other deeds are mentioned and referred to in the body of the answer, in the terms "but for his greater certainty," &c. The plaintiff is entitled to their production. They afford no defence to the defendant; they form no part of the defendant's case, and it cannot be for the benefit of the defendant to resist the application. On

[1] 16 Ves. 435.

[2] 8 Madd. 432. [December 8, 1818. "A motion was made for the production of books, papers, and writings mentioned in the defendant's answer. This was opposed, on the ground that though the defendant answering at all was bound to answer fully, yet that if by his answer the defendant insists that the plaintiff is not entitled to the account he seeks, the court will not compel him to produce books, &c., until the plaintiff has established his title to the account on the hearing of the cause.

"The VICE-CHANCELLOR (Sir J. LEACH). I can make no such distinction. The plaintiff might compel the defendant to set out the contents of the books in his answer, and the production of the books is a part of the discovery which the defendant submitting to answer submits to make. The motion must be granted."—ED.]

the other hand, proof of the assignment of Sparke's mortgage, and of the contract which existed between Ogden and Sparke, is material to the plaintiff, and proof of those deeds is all that is required. The defendant, by referring to them, has made them part of his answer, and is bound to produce them.

Mr. *Wigram*, contra. The plaintiff is in the situation of a mortgagor who files his bill for redemption, and insists that he has a right to call on the mortgagee to produce his deeds. The bill prays that the defendant Carvick may be paid what is due to him; and now, before the hearing of the cause, he is to be compelled to produce his deeds. The answer to such an application is, that he is not bound by any rule of law to disclose his securities before he is paid. In a case before Lord Kenyon, where a similar application was made, his Lordship said he would advise the mortgagee to put his deeds into a box, and sit upon the box till the mortgage money was actually put into his hands. In Buden *v.* Dore,[1] Lord Hardwicke said he would not compel a discovery of the deeds and writings of the defendant's title, though, if there was any charge in the bill that the defendant had in his power deeds and writings of the plaintiff's title, an answer must be given to such a charge. In Wilson *v.* Foster[2] the demurrer was allowed, because the deed related to the defendant's title, and the plaintiffs had no interest in it. Here, it is true, the plaintiff has an interest in the deeds, but subject to the defendant's annuity. The same doctrine is now held in the Court of Chancery, though formerly that court was more severe on defendants than this court, and used to compel them to produce deeds in cases where this court would not. Tyler *v.* Drayton;[3] Bolton *v.* Corporation of Liverpool.[4] The notice of motion extends to six different documents. The bill contains no charge that these documents are essential to the plaintiff's title; they are, therefore, not referred to by the defendant in answer to such a charge, nor is there any thing in the answer distinguishing one from another, but they are stated as part of his own title. There is no rule that, because a deed is stated or referred to in the answer, therefore it must be produced. The reference is necessary for the defendant; for if the statement in the answer was not coupled with a reference, the answer would be read without qualification. Cox *v.* Allingham.[5] [The Lord Chief Baron. The reservation is merely in favor of the party who makes it. He states his belief of the document; but for greater certainty refers to it when produced.]

Mr. *Wakefield*, in reply. Carvick is not a mortgagee; he is the grantee of an annuity charged upon real estate. A mortgagee has an

[1] 2 Ves. sen. 445. [2] 1 Younge, 280. [3] 2 Sim. & Stu. 309.
[4] 1 Myl. & K. 88. [5] Jacob, 337.

absolute estate at law, and until redemption the mortgagor is out of his estate. But in the case of an annuity, the estate, subject to the annuity, is the grantor's. Ogden was not a mortgagee, as between Sparke and Carvick. [The LORD CHIEF BARON. The legal estate is in Ogden, and he hands over the title-deeds as a security to Allen.] For the purpose only of securing the annuity. Allen never could foreclose. [The LORD CHIEF BARON. May not the assignee of that security, supposing there was no assignment of the mortgage, make use of Ogden's name?] Not as against Sparke. He is a trustee for Sparke, subject to the annuity. If I assign a legal estate to secure an annuity, the annuitant is trustee for me, subject to the annuity. Ogden is repaid. I am, therefore, entitled to say, give me back my mortgage, subject to the annuity. The assignee cannot go beyond the annuity; if he became a mortgagee, it was only a mortgage for that particular purpose; he cannot treat it as a mortgage for his own purposes. Besides, it has never been determined that a mortgagee is not to produce his deeds for the purposes of proof. In the case in Vesey the deeds made out the defendant's title, in which the plaintiff had no interest. The same remark applies to the other cases. But has it ever been decided that a plaintiff having an interest, and not even looking into the deed, is not entitled to have it proved? In Cox *v.* Allingham the deed was lost. Suppose the defendant had said he believed the deed as set forth in the bill to be true, but for his greater certainty referred to a copy of it in the schedule to his answer, would not the court have said, produce the copy and allow it to be proved? In Tyler *v.* Drayton all the deeds but those disputed were produced. Here the plaintiff seeks the proof of that which is common title between her and this defendant; and the proof is absolutely necessary as against the other defendants. It is said that the bill contains no charge as to the deed being in the power or custody of the defendant. Now the deeds are set out in the bill, and there is a charge that they are fraudulent and void against the plaintiff, or that the said defendant Montriou ought to be declared a trustee of the premises for the plaintiff.

December 23.

The LORD CHIEF BARON, after taking time to consider the case, made the following order: That the deeds should be produced before the examiner for the purpose of being proved, but without prejudice to the question whether or not the defendant should be bound to produce them at the hearing; with respect to which it was to be considered as if the deeds were not proved, but as if the witnesses were present at the hearing. The deeds to be in court at the hearing.

PILKINGTON v. HIMSWORTH.

BEFORE LORD ABINGER, C. B. FEBRUARY 18, 1836.

[*Reported in* 1 *Younge & Collyer*, 617.]

THE plaintiff in this case, who was a farmer and land-surveyor, had employed the defendant as his bailiff at 10*s*. per week. In February, 1835, the plaintiff gave up his farm, and thereupon the relation between the parties ceased, the plaintiff believing that all accounts between them had been settled and paid. The defendant afterwards charged the plaintiff to the amount of £176, including £10 alleged to be due from the plaintiff on his promissory note. The plaintiff refusing to pay this sum, the defendant commenced an action against him on the note, and also to recover £176 for goods sold and delivered, work and labor done, money paid, and on an account stated. The plaintiff then filed his bill, alleging that the note in question had been long since paid, though left confidentially in the defendant's custody, and praying for a general account of the dealings and transactions between himself and the defendant, for discovery of evidence of the truth of the charges, and for an injunction to restrain the action.

The case made by the defendant was, that the plaintiff had employed a clerk in his business of surveyor, who nad made acknowledgments which bound the plaintiff, and upon those merits the common injunction which had been obtained was dissolved. The defendant by his answer denied that the note in question had been paid, but admitted that it was one of the items of account between himself and the plaintiff, and that it was in his possession.

Mr. *Jeremy* now moved that the defendant might be ordered to deposit this note with his clerk in court, with liberty to the plaintiff to inspect it, observing that at the hearing the plaintiff might be able to show, either from indorsements on the note or otherwise, that at least as to that item in the account he was entitled to some relief.

Mr. *S. Girdlestone*, for the defendant. The injunction has been already dissolved on the merits. The plaintiff has not such an interest in this note as to entitle him to have it produced in this court. The note must be produced at the trial of the action, and it will then be

competent for him to dispute its validity. This is in effect the defendant's title-deed. Under similar circumstances the Vice-Chancellor refused to allow the production of a bill of exchange. [The LORD CHIEF BARON. Suppose it had been suggested to be a forged bill, would not a court of equity have allowed the plaintiff inspection? If the Vice-Chancellor thought otherwise, he must have been of opinion that he had a more limited power than is exercised by a judge at law.] In Freeman *v.* Baker,[1] a person drew a bill upon Roberts, one of the directors of a company, who accepted it in the name of himself and the other directors. It was then indorsed to Freeman, who brought an action upon it, not against Roberts, but against the other directors. They filed a bill for discovery, alleging want of consideration. Freeman's defence was, that he gave consideration for it by means of a check upon his bankers. A motion was made that Freeman might be ordered to produce the bill of exchange and the check. The Vice-Chancellor granted the motion as to the check, but refused it as to the bill of exchange. [The LORD CHIEF BARON. There the only case made was, that the bill was indorsed without consideration; and, therefore, there was no occasion to look at the bill. Here it is alleged that in the pleadings at law there is a count on the promissory note, and a count on the account stated. Now, to give evidence on the account stated, there is no occasion to produce the note before the jury, and you might get a verdict without it. It is contended, however, for the plaintiff, that though the accounts are *prima facie* evidence against him, yet, upon an inspection of them and of the note, he might be able to make out a case of fraud. Suppose, upon the hearing, the plaintiff adduces sufficient evidence for me to refer it to the Master to see whether this was a fair account, you must then produce the note in the Master's office.] If we went into the Master's office upon the settled account, and the Master was of opinion that the accounts were not binding, it would be optional with us to produce the note. However, the case made by the plaintiff's bill is not that of a settled account impeachable for fraud, but that of an unsettled account. The defendant by his answer denies that the note has been paid.

The LORD CHIEF BARON. I think the plaintiff has a right to see the note. I must not take answers to be conclusive in all cases. They are so for certain purposes, but not for others. *Motion granted.*

[1] Not reported.

BROWN *v.* THORNTON.

BEFORE LORD COTTENHAM, C. MARCH 9, 11, AND 31, 1836.

[*Reported in* 1 *Mylne & Craig*, 243.]

IN this case the bill was filed to obtain a discovery in aid of an action at law about to be brought by the plaintiff upon a charter-party. The defendant by his answer admitted the possession of certain documents, which he specified. The common order was made, requiring him to leave the documents with his clerk in court for the usual purposes; by agreement, however, the documents were inspected at the office of the defendant's solicitor. The plaintiff gave notice to the attorney of the defendant to produce at the trial of the action a copy, in Dutch, of the charter-party, that copy being one of the documents which the defendant admitted by his answer to be in his possession. When the trial took place, the defendant's counsel were called upon to produce the copy of the charter-party, which they declined to do. On the part of the plaintiff, secondary evidence of its contents was then tendered. This was objected to on the part of the defendant; but the judge received the secondary evidence, and a verdict passed for the plaintiff, with permission to the defendant to move for leave to enter a nonsuit, upon the ground that the secondary evidence in question had been improperly received. The defendant afterwards obtained from the Court of King's Bench a rule *nisi* for entering a nonsuit. The Vice-Chancellor subsequently, upon the motion of the plaintiff, made an order by which the defendant was directed to produce on the trial of the action at law in the bill mentioned, and on any proceedings incident thereto, the documents admitted by his answer to be in his possession. This order was obtained for the purpose of securing to the plaintiff the benefit of the production of the copy of the charter-party, upon the occasion of showing cause against the rule, as well as for the purpose of having it produced at any new trial of the action which might be ordered.

A motion was now made to discharge the Vice-Chancellor's order.

Mr. *Wigram*, in support of the motion. The Vice-Chancellor, by his order in the present instance, following his own decision in the

case of Crowley v. Perkins,[1] treats it as a matter of course for the plaintiff in a bill of discovery to obtain an order for the production, upon a trial at law, of any documents which the defendant may have admitted by his answer to be in his possession, without the plaintiff being obliged to read the whole answer. This proceeding is at variance with the constant course and practice of the court. The documents which a defendant by his answer admits to be in his possession are to be considered as part of his answer, and were formerly set forth in it at full length. The answer is one entire admission. It is a rule of the courts of law that a party shall not be at liberty to read a part only of an answer, or to give secondary evidence which he has procured by means of a defendant's answer, without reading the whole of the answer, unless the party has obtained a special order for that purpose from the court of equity in which the bill has been filed. In the case of Gurney v. Whitbread,[2] in the Exchequer, Lord Lyndhurst stated that he had acted upon this rule at *nisi prius*. Before the case of Crowley v. Perkins, this special order was never made upon a bill of discovery; and upon a bill for relief it was only made after hearing the merits of the case. Aston v. Lord Exeter;[3] Marsh v. Sibbald.[4] No proceeding is now pending upon which the documents ordered to be produced can be legitimately used; there is, therefore, no reason why the order should have been made.

Mr. *Jacob*, contra. There has been no judgment in the action, which is still pending. When cause shall be shown against the rule, it will be competent for the Court of King's Bench to direct either that there shall be a new trial, or that a nonsuit shall be entered, or that the damages shall be reduced; or that court may make any other order which it shall think fit. Under the Vice-Chancellor's order the defendant would be bound to produce the document in question upon the argument in the King's Bench; that was the principal purpose for which the order was obtained; and if a new trial should be ordered, it will be the duty of the defendant to produce the document upon such new trial. It is very much of course to make such an order as

[1] 5 Sim. 552. [November 26, 1832. "Mr. *Knight* moved that the defendant to a bill of discovery, in aid of an action at law, might be ordered to produce, at the trial of the action, the documents set forth in the schedule to his answer as being in his custody.

"The question was, whether it was the practice of the court to do more than order the documents to be produced, and left with the clerk in court for the usual purposes.

"But the Vice-Chancellor (Sir L. Shadwell) ordered the documents to be produced at the trial." — Ed.]

[2] Younge, 541, on another point.

[3] 6 Ves. 288. And see Hylton v. Morgan, 6 Ves. 293.

[4] 2 Ves. & Bea. 375.

the present, except that sometimes, instead of directing the party himself to produce the documents, as in this instance, the clerk in court is ordered to attend with them at the trial. There is no decided case which proves that the rule at law is such as has been stated on the other side. Such a rule cannot be assumed to exist until a decision *in banco* shall have established it. A court of law cannot inquire by what means a party has got possession of documents; whether by means of a bill in equity or otherwise. Crowley *v.* Perkins, which was decided in 1832, has never been disputed.

Mr. *Wigram*, in reply. It is a clear rule that a party applying to the court to order the production of documents must show that there is some legitimate purpose for which they can be used. To use the documents upon the argument in the King's Bench would not be to use them for a legitimate purpose. The general rule is, that if you take an admission, you must take the whole admission. This order is an infringement of that rule. A plaintiff has no right to use a defendant's document without the explanation which the defendant has given with respect to it. The decision in Crowley *v.* Perkins is erroneous; for in effect it lays it down as an abstract proposition that a plaintiff is entitled to select from among a defendant's documents such as he pleases, and to give them in evidence against the defendant, without any explanation on the defendant's part. If the rule at law be not such as has been already stated, and if a court of law will allow a party to give secondary evidence of a document, the knowledge of the contents of which he has obtained in the present manner, without reading the whole answer, then there is no necessity for the present special order, and it should on that account, therefore, be discharged.

March 11.

The Lord Chancellor. I have quite satisfied my mind that the rule stated to prevail at law does prevail there, and that where a party produces at law a document which he has obtained by means of a bill of discovery only, the judges at common law will not allow him to use it without using the answer also. The rule, however, is not insisted on if this court has made an order for the production of the document.

The question is one of great importance, and it is strange that so little relating to it should be found in the books. It appears to me that all that I can do is to request the registrar to search and inform me what orders are to be found with respect to the production at trials of documents of which the possession has been admitted in answers to mere bills of discovery.

March 31.

The case stood this day in the paper for judgment; but, before judgment was pronounced, Mr. *Jacob* mentioned to the Lord Chancellor, in addition to the cases before cited, Williams *v.* Munnings;[1] Harris *v.* Bodenham;[2] Taylor *v.* Sheppard;[3] and Bland *v.* Wainwright, a late case in the Exchequer, not yet reported. He stated that in the last-mentioned case an action had been brought against an insurance office upon a policy of life insurance. The defence was that fraud had been used in effecting the policy. The insurance office filed a bill of discovery in aid of their defence, and obtained the usual order, that the defendant in equity should produce and leave certain documents in the hands of his clerk in court. This order was complied with. The defendant in equity afterwards applied to the court to have the documents back again. The application was resisted, upon the ground that the documents could not then be produced at the trial. An order was made that they should be redelivered to the defendant in equity, upon the terms of his producing them at the trial; he produced them accordingly, and they were read against him, without the whole answer being read.

The Lord Chancellor. The uniform opinion of the judges of the courts of common law is, that when a bill of discovery has been filed, to which an answer has been put in, and documents are produced at the trial as part of the answer, in which character alone the plaintiff in equity is entitled to use them, the whole answer must be read; but, on the other hand, when a court of equity has interfered, and has ordered the documents to be produced and read, the court of law sitting at *nisi prius* pays such respect to the order of the court of equity that it allows the documents to be read alone, without inquiring into the grounds of the order. That is the rule established at law, and it is consistent with what is the situation of the parties. The question is, whether, upon a mere bill of discovery, a court of equity ought to interfere so as to relieve the plaintiff in equity from the necessity of doing that which he is by law bound to do; that is, on a bill of discovery to give the plaintiff in equity a benefit beyond that which he is entitled to derive from the answer to such a bill. I was surprised to hear the affirmative contended for in the argument, because I thought that such a course would be giving relief; the court would not in that case be used for the purpose of obtaining discovery.

It is obvious that the effect of the Vice-Chancellor's order was to give the party a benefit he could not otherwise have, namely, the

[1] R. & M. 18. [2] 1 Sim. & Stu. 283. [3] 1 Younge & Coll. 284.

power of using a document in a manner in which he would not in other respects be entitled to use it. I directed the registrars to search whether there was any precedent of such an order having been made on a bill of discovery. The result is that no such order can be found upon a bill of discovery, except that in the case of Crowley v. Perkins, which was cited in the argument. That result is quite consistent with the doctrine of the judges at law. This court does not, upon a bill of discovery, interfere with the rights of the parties; it merely gives the discovery sought. If the court were to go further, the bill would not be a bill of discovery, and there would be a departure from the practice of the court upon a bill of discovery. As soon as the defendant in equity has put in his answer he is entitled to his costs, and the office of the court is discharged. The court has no jurisdiction to exercise on a bill of discovery; it leaves the parties to make the best use of the discovery they can.

Whether the rule at law be right or not, is not a matter for my consideration; it is sufficient for me to say that this court will not interfere. In the cases of Harris v. Bodenham and Taylor v. Sheppard, which have been referred to to-day, the present question was not raised; nor does it appear that in either of them the bill was a bill of discovery. The order must be discharged. The court makes no order with respect to the production. It does not interfere at all.

Order of the Vice-Chancellor discharged.[1]

[1] As to the rule at law, see 1 Phil. Ev. 359, 360, 7th ed.; 1 Stark. Ev. 236, 237, 2d ed.; and Long v. Champion, 2 B. & Adol. 284.

EDWARD LATIMER, *Appellant*, *v.* WILLIAM NEATE, *Respondent.*

IN THE HOUSE OF LORDS. APRIL 25, 1837.

[*Reported in* 4 *Clark & Finnelly*, 570.]

THE respondent filed his bill in the Court of Exchequer in 1835 against the Duke of Marlborough and the appellant, stating, among other things, that he had brought an action against the duke in the year 1818 to recover various sums of money which he had lent to him in the years 1812 and 1815, and for which he had his bond to secure payment with interest; that the duke's attorney signed a *cognovit* in the said action for £8480 principal, interest, and costs, and judgment was entered up thereon and duly kept on foot; that the respondent, for obtaining satisfaction of the judgment, sued out a writ of *fieri facias* in November, 1824, directed to the sheriff of Oxfordshire, who by virtue thereof took in execution divers goods and chattels in the possession of the duke, at and about his mansion-house at Blenheim; that the appellant claimed part of the said goods, and brought an action against the said sheriff for taking them, and obtained a verdict therein; that in May, 1833, there being then due to the respondent on the said judgment £12,696 and upwards, he sued out a writ of *pluries testatum fi. fa.* against the duke, and the then sheriff of Oxfordshire, by virtue of said writ, took in execution divers goods and chattels in and about the mansion-house and premises at Blenheim. The bill further stated and charged that the Duke of Marlborough and the appellant represented to the said sheriff or to his officers that the goods and chattels so taken in execution were the absolute property of the appellant, and they promised to indemnify the sheriff if he would return *nulla bona*, and the sheriff, upon receiving an indemnity, did accordingly return *nulla bona* to the said writ, whereupon the respondent brought an action against the sheriff for a false return, which action was still pending. That the Duke of Marlborough resided at Blenheim in the said month of May, 1833, and ever since, and there was then, and has been ever since, in and about the mansion-house there a large quantity of goods and chattels and personal effects of various kinds, and of great

value on the whole; that from the year 1824 down to the year 1832, both inclusive, several bills of sale and assignments of parts of the goods and chattels at Blenheim were executed by the duke to the appellant without any consideration, and no part of the said goods had ever been removed, but the duke continued to use them as his absolute property, and that all the said bills of sale and assignments were void as against the respondent; that in the year 1823 one Charles Richardson had a judgment against the duke, and sued out execution thereon, under which property of various descriptions at Blenheim was seized by the sheriff of Oxfordshire, from whom Richardson took a bill of sale, and in May, 1824, the appellant took the said bill of sale from Richardson, and paid him £700 for the goods and chattels comprised therein, and put his servant in possession of them at Blenheim. That in 1826 the appellant sold the said goods to the Duke of Marlborough for £700, the whole of which had been since paid by the duke, and he was the only person beneficially interested in and equitably entitled to the said goods and chattels, but the appellant had not executed an assignment of them, and the legal property in them was still vested in him, and if he and the duke would set forth an account of the pecuniary transactions between them from the year 1823, it would thereby appear that nothing was due to the appellant in respect of the said £700; that the respondent believed the appellant was a trustee of the goods and chattels comprised in the bills of sale and assignments, and that the duke had the beneficial and equitable interest in them, and they were the only property of the duke that could be made applicable to the respondent's debt; that the respondent was always ready and willing to pay to the appellant what, if any thing, was due to him from the duke on the security of the said goods and chattels; that the duke and the appellant had in their possession or power divers deeds, bills of sale, assignments, and accounts relating to the matters aforesaid, and ought to set forth a list of the same, and leave them with their clerk in court.

The bill, after further charging the Duke of Marlborough with keeping away witnesses necessary for the respondent in support of his action, and that the duke and appellant had used all means in their power to prevent him from obtaining payment of his judgment debt, prayed, among other things, that it might be declared that all the said bills of sale and assignments were void as against the respondent, and that the same might be ordered to be delivered up and to be cancelled; and that it might be referred to one of the Masters to take an account of what was due to the respondent from the Duke of Marlborough upon the said judgment, and also an account of all pecuniary dealings between the duke and the appellant since the beginning of 1823; and

if the Master, upon taking the last-mentioned account, should find a balance due from the duke to the appellant, that in that case he might be directed to inquire and state whether the appellant had any lien for payment thereof upon any of the goods and chattels at Blenheim, the respondent thereby offering to pay the appellant what should be so found due to him upon the security of the said goods and chattels, and that the value of the same, and the particulars whereof they consisted, might be ascertained, and that they might be sold, and the proceeds applied in payment of the respondent's debt and costs, and of what, if any thing, he should pay the appellant; or that the Master might take an account of the said goods and chattels, and ascertain the nature and amount of the equitable interest of the Duke of Marlborough therein, and that the same might be applied in satisfaction of the respondent's debt, &c.

The appellant, by his answer to the bill, admitted that the sheriff seized part of the goods and chattels at Blenheim, under the writ of execution issued in May, 1833, and the appellant claimed them as belonging to himself, and being in the possession of one Wilson, his servant, and he undertook to indemnify the sheriff for making the return of *nulla bona* to the writ. And the appellant claimed to be the legal owner, as against the respondent, of all the goods and chattels in and about the mansion-house and premises at Blenheim (except such as were heirlooms, and belonged to the trustees of the late Duke of Marlborough), by virtue of certain bills of sale, assignments, and other legal instruments duly executed for valuable consideration, and bearing date respectively as the answer mentioned. That the duke was indebted to the appellant as a judgment creditor and equitable mortgagee to the amount of £8000, and that all the securities which had been obtained by him from the duke were a very scanty and insufficient security for the payment of the said debt. And the appellant denied that any sum of money had been paid to him by the duke, in satisfaction of the said £700 in the bill mentioned, or that the appellant had received any sum or sums of money on account of the duke, applicable to the payment of the said £700; or that the appellant agreed to sell to the duke the goods and chattels comprised in the bill of sale, for which appellant paid the said sum of £700 to Charles Richardson, and he insisted that the legal property in the said goods and chattels was vested in him, and that all the charges in the bill relating to the pretended agreement between the appellant and the duke for the resale of the said goods and chattels to the duke were unfounded; and he insisted that the respondent had not made out a case to entitle him to any account of the pecuniary dealings between the appellant and the duke; and that the said bills of sale, assignments, and legal instru-

ments were the appellant's title-deeds to the said goods and chattels, and the Duke of Marlborough used the same at Blenheim by permission of the appellant, but not as his own absolute property; and the appellant did not believe that he was a trustee of the said goods and chattels for the Duke of Marlborough, but as between himself and the duke he claimed to be an equitable mortgagee, or to have a lien on them for a debt of £8000 and upwards due to him from the duke; and upon payment of the said debt into court the appellant was willing to deposit in court all the bills of sale, assignments, and legal instruments in his possession. The appellant submitted that he was not bound to state the considerations which he gave for the said bills of sale, &c.

The respondent took exceptions to the answer for insufficiency, in respect of its not discovering the consideration given. Some of the exceptions were allowed, and the appellant further answered, and annexed to his answer two schedules, in one of which he set forth an account and abstract of all the bills of sale and assignments of the said goods and chattels at Blenheim not belonging to the late Duke of Marlborough's trustees, and of which he claimed the benefit against the respondent; and in the other he set forth an account of the pecuniary dealings between himself and the duke since the year 1823.

Upon motion made before the Lord Chief Baron [1] in July, 1836, his Lordship ordered the appellant to deposit with his clerk in court the several bills of sale, assignments, and legal instruments in his answers mentioned, and that the respondent might be at liberty to inspect the same, and take copies, &c.[2]

The appeal was against that order.

[1] Abinger. — Ed.

[2] 2 Younge & Coll. 257. [The following is the report of the arguments and decision in the court below: —

"Mr. *Temple* and Mr. *Ellison*, for the motion. The rule that a purchaser for a valuable consideration without notice cannot be compelled to discover his title-deeds, does not extend to the mortgage or purchase deed itself. *Ex parte* Caldecott, Mont. 55. The defendant insists that he is a *bona fide* mortgagee, and has a lien on this personal property for the amount of his advances. If that be so, the Duke of Marlborough would have a right to inspect the deeds himself, in order to know the amount due from him, and consequently a judgment creditor of his stands in the same situation. A mortgagee never can object to produce the mortgage-deed. If the plaintiff amended his bill, he might compel the defendant to set out the deeds *in hæc verba*, which would only be creating useless expense. If the deeds are produced, it will appear in the action against the sheriff what goods are not covered by these securities. Looking, however, at the defendant, not as mortgagee, but as claiming the goods under the bills of sale, we seek to impeach his securities for fraud, and on that ground have a right to their production. In Beckford *v.* Wildman, 16 Ves. 438, Lord Eldon says, 'that where the object of the suit is to destroy the deed, the plaintiff has a right to have it produced.' In that case, the motion was not acceded to as being unusual in point of form, but the rule of practice, as laid down by Lord

Mr. *Simpkinson* and Mr. *Bethell*, for the appellant. The production of documents to a plaintiff in aid of the discovery sought by his bill,

Eldon, is undisputed. Balch *v.* Symes, Turn. & Russ. 87. In Kennedy *v.* Green, 6 Sim. 6, it was held, that a party who alleged himself to be a purchaser for a valuable consideration without notice of fraud, was bound to answer all the allegations of the bill tending to show that he had such notice, and not having so done, he was ordered to produce the purchase deed. Here the defendant, in answer to a variety of questions relative to the consideration given for the assignments, simply alleges that he gave a valuable consideration for them. That is not a sufficient answer to a bill charging want of consideration, and on that ground the order for production should be made.

"Mr. *Simpkinson* and Mr. *C. Romilly*, contra. The case of *Ex parte* Caldecott does not decide that a deed of conveyance to a party is not his title-deed. The principle of that case is, that in consequence of the privity of contract between the mortgagor and mortgagee, the mortgagor has such an interest in the mortgage-deed as to be entitled to call upon the mortgagee to produce it. The mortgagor's interest appears upon the face of the deed, and the mortgagee is his trustee. The plaintiff, however, is not in the situation of a mortgagee, and, feeling that difficulty, he treats the bill in two different characters, — first, as a bill to redeem, and next as a bill to set aside a conveyance for fraud. He asks that the bills of sale may be declared void, and yet that the Master may inquire whether the defendant has any lien. [The Lord Chief Baron. The plaintiff asks for that in case the deeds are found valid.] He cannot redeem at all so long as this imputation of the deeds remains on the record. The main object of the bill is clearly to impeach these securities, and, taking it in that light, this case differs materially from those which have been cited. In those cases the bill was filed by a party to the instrument: the party himself impeaching his own instrument. But it would be a very different thing to say that a party is entitled to call for the inspection of the instrument for the benefit of third persons. In Beckford *v.* Wildman, all that Lord Eldon said he could do was to order the deed to be produced at the hearing. [The Lord Chief Baron. The object there was not to impeach the deed, but to take an account.] Then what was said in Balch *v.* Symes was merely a loose *dictum*, which, though cited as authority in the subsequent case of Tyler *v.* Drayton, 2 S. & S. 309, was not acted upon. In the latter case, which was a bill to set aside a conveyance for fraud, Sir John Leach refused to order the production of the instrument. [The Lord Chief Baron. The purchase deed there could have no relation to the plaintiff's title.] In Kennedy *v.* Green, the existence of the alleged indorsements on the deed not being denied by the defendant, the court treated the case as one of suspicion, and as warranting a departure from the general rule.

"Admitting that, as a mortgagor or judgment creditor of the Duke of Marlborough, the plaintiff might, under some circumstances, have a right to the production of these instruments, can he insist upon such a right while claiming, not under, but against the duke? He claims by an adverse title, alleging that he has obtained a judgment which gives him a lien on the property. The cases upon the subject depend upon contract or derivative contract. Sparke *v.* Montriou, 1 Younge & Coll. 103; Postlethwaite *v.* Blythe, 2 Swanst. 256.

"The Lord Chief Baron. The general rule upon this subject is liable to so many exceptions, that it is difficult to know to what cases it may be applied. The general rule is, that a party is not bound to produce his own title-deeds for the inspection of his opponent; yet, if the party seeking their production has an equal interest in them with the holder, that gives him an equal right to their production. Again, a party is not bound to produce title-deeds which are only collateral to the title of the

before the hearing of the cause, is granted either on the ground that the defendant has made the documents part of his answer, or because

party seeking their production. A mortgagee generally is not bound to produce his title-deeds without payment of the money due to him; but, suppose the mortgagor says that the mortgage-deed has been falsified, and that a larger sum has been inserted in it than he ever received or intended to receive, if he impeach it for fraud in this manner he is entitled to have that question tried before he pays even the sum which he admits to be due. But it follows that unless he has the inspection of the deed he may fail in his object, because he may wish to take advantage of some particular part of the instrument. It is clear that if he wants to know what sum is due, he is not bound to trust to the oath of the mortgagee. So that, in many cases, it depends upon the particular object which the plaintiff seeks to accomplish, whether he has a right to inspect the deed or not.

"Now, it would be preposterous to say that a first mortgagee might be called upon by the second to produce his mortgage, in order that upon a bill for foreclosure the second mortgagee might have the advantage of impeaching the title of the first. But suppose some fraud to have existed between the first mortgagee and the mortgagor, and that in consequence of their representations the second mortgagee was prevailed upon to advance a larger sum than he otherwise would have done; if he afterwards filed his bill for a discovery of the fraud, and made the first mortgagee a party to the bill, unless the latter made a perfect discovery of those facts, how could a court of equity administer justice without calling upon him to produce the deed? The second mortgagee might say to the first incumbrancer, 'When I advanced my money, £5000 was represented to be due to you, and now it turns out to be £10,000; there must be some collusion between you and the mortgagor, and I desire discovery.' It is possible, therefore, to suppose a case where a court of equity would call upon a party to disclose that deed from which evidence of the fraud might be obtained. In the present case, I do not see in what way a court of equity could relieve the plaintiff, unless the deed were brought into court; and as it must be produced at some time or other, why not before the hearing?

"It was said by Mr. Romilly that no imputation of fraud rests against the defendant Latimer. Is that so? He denies fraud generally; but the question is, whether the facts on which the allegation of fraud is founded are denied. The important question is, whether Latimer is *bona fide* preventing the Duke of Marlborough from having the personal enjoyment of the goods and chattels at Blenheim, the possession of which by the duke is a badge of fraud as between him and Latimer. The possession of goods not going with the title, has always been admitted as a badge of fraud. That has been evaded in this case by putting a person in possession. Why is that person in possession of the goods at Blenheim, except for the purpose of saying that the duke is not in possession? But the duke has the substantial benefit of the goods; he has the entire usufruct of the whole. How is that consistent with the allegation that Latimer is in possession of the whole? The case is not free from suspicion. The plaintiff says, 'The fact of the Duke of Marlborough residing at Blenheim in possession of goods upon which I have a right of execution, as the fruit of my judgment, while at the same time another party alleges that he has the possession of them, is itself a circumstance which demands inquiry; therefore I am not bound to take the oath of Latimer as to the claim which he sets up. I require an investigation of the amount of that claim, and the circumstances in which I find the goods placed justify the inquiry.' If they had been in the possession of Latimer, subject to the claim of the Duke of Marlborough to redeem, it would have been the ordinary case of the first mortgagee insisting upon his prior right to be redeemed. But, under the circum-

the plaintiff can, out of the defendant's answer, show that he has an interest in the documents. That is, a right to discovery of them, as forming part of his title-deeds, or as being material to the decision of the issue raised in the record. The respondent has not shown such an interest in these bills of sale and other instruments as could entitle him to such production and inspection of them as is directed by the order of the court below. Burton *v.* Neville;[1] Sampson *v.* Swettenham.[2] It is of the greatest importance to the safety of suitors that they be not compelled to produce their title-deeds. The courts do not require them to ask protection by plea against production of them, but will take care that they are not to be called on to produce them without good reason. Hall *v.* Atkinson;[3] Vansittart *v.* Barber;[4] Lady Shaftesbury *v.* Arrowsmith;[5] Bolton *v.* The Corporation of Liverpool.[6] The documents, the production of which has been ordered by the court below, are the evidences of the appellant's title to the goods and chattels comprised in them, and for which he paid full consideration. To compel a purchaser to produce his title-deeds is contrary to the practice and principles of courts of equity. There are several late decisions upon evidence in tithe cases, bearing out the doctrine contended for by the appellant. Bligh *v.* Benson;[7] Brazier *v.* Mytton;[8] Tomlinson *v.* Lymer;[9] Tomlinson *v.* Booth.[10]

stances of this case, — one man having the goods and another the title by assignment, — the plaintiff may say, 'I am not bound without further inquiry to pay the £8000, and investigate the matter afterwards. Why should I be liable to the necessity of filing another bill to have the money refunded?'

"Upon the whole, it appears that the plaintiff has a judgment which would operate upon these goods, except for Latimer's claim. A suspicion naturally arises as to the nature of that claim from the situation of the goods. If that situation is a sufficient badge of fraud, it is a sufficient cause for investigation. I do not mean to say that the case is conclusive against the defendants, but I think there is sufficient to induce the plaintiff to say that he ought not to be bound by Latimer's assertions without production of the deeds. If the case is an honest one, I see no reason why he should not produce them. I do not say it is not an honest case, but only that there is no reason why he should not produce the deeds if the case is free from suspicion or taint of fraud. He is bound, however, to produce them, on the ground that the plaintiff, having an interest in these goods, and having a right to redeem Latimer's mortgage upon payment of the full amount due to him, has an interest in paring down Latimer's title, and in reducing it to its proper dimensions before he purchases it, and that it is not a case in which Latimer can say that he is a mortgagee, with respect to whom the plaintiff stands in the situation of a mere stranger, or that the plaintiff must satisfy the amount of his claim before he can ask for the production of these deeds. That, I think, is not his case. The deeds, therefore, must be produced.

"*Order accordingly.*" — ED.]

[1] 2 Cox, 242.
[2] 5 Madd. 16.
[3] 2 Vern. 463.
[4] 9 Price, 641.
[5] 4 Ves. 66.
[6] 1 Myl. & K. 88.
[7] 7 Price, 205.
[8] M'Clel. & You. 613.
[9] 2 Sim. 489.
[10] 4 Sim. 461.

The respondent's bill impeached the bills of sale and the assignments, and sought to set them aside as fraudulent. The court, under such circumstances, ought not to have ordered production of the instruments before the hearing, without a very special cause. Beckford v. Wildman;[1] Tyler v. Drayton.[2] In opposition to the principle laid down in these cases, the court below ordered production of the documents in question, on the authority of Balch v. Symes[3] and Kennedy v. Green,[4] which were cases involving special circumstances. Notwithstanding the case *Ex parte* Caldecott,[5] where the commissioners of bankrupts, under the 33d & 34th section of the act 6 Geo. 4, c. 16, ordered the production of a mortgage-deed, a mortgagee was never compelled until lately to produce his mortgage-deeds, except upon payment of principal, interest, and costs. Postlethwaite v. Blythe.[6] The only ground of suspicion of fraud on the part of the appellant was, that the goods were allowed to remain in the use and ostensible possession of the Duke of Marlborough. But it was held in this very case, and in others of later occurrence, that a bill of sale is not fraudulent by reason of the goods remaining in the possession of the vendor or debtor. Latimer v. Batson;[7] Martindale v. Booth.[8]

The Lord Chancellor. The respondent's bill treats the appellant as equitable mortgagee, as an incumbrancer for £700, and states in effect that the Duke of Marlborough is owner of the property, subject to that debt.

Mr. *Temple* and Mr. *Ellison*, for the respondent. The appellant's claim on the goods in the use and possession of the Duke of Marlborough is liable to much suspicion. If he has an honest claim and lien on the goods comprised in the bills of sale, what injury can he sustain by producing them? The respondent will be unquestionably entitled to a full disclosure, if he will only amend his bill and submit to the delay and expense of beginning again. The parties to the action are at issue; the venue is laid in Oxfordshire, but they have been waiting the result of this appeal. The appellant can, at most, be only trustee for the Duke of Marlborough, who has the beneficial interest in the goods and chattels, and by the operation of equity the respondent's judgment attaches on that interest.

The rule that a purchaser for valuable consideration cannot be compelled to produce his title-deeds, does not extend to bills of sale and assignments, of which the respondent demands inspection. They are not title-deeds. The distinction between title or purchase deeds and mortgage-deeds is stated by Lord Eldon in Postlethwaite v. Blythe.[9]

[1] 16 Ves. 488. [2] 2 Sim. & Stu. 309. [3] 1 T. & R. 87.
[4] 6 Sim. 6. [5] 1 Mont. 55. [6] 8 Madd. 242.
[7] 4 B. & C. 652. [8] 8 B. & A. 498. [9] 2 Swanst. 256.

A defendant cannot protect himself by his answer against answering fully. Ovey *v.* Leighton.[1] A plea would, in some cases, be the proper mode of protection, but here a plea would not be a protection against the discovery sought by the respondent. Hardman *v.* Ellames.[2] The question in this appeal has been decided by *Ex parte* Caldecott.[3] There is no doubt that the Duke of Marlborough, the mortgagor, would be entitled to inspection of these deeds before redeeming, and it is equally certain that the respondent is entitled, as judgment creditor of the duke, to stand in his place, he offering to pay the appellant whatever is justly due to him on the security of the duke's goods and chattels. The respondent, in that view of the relative situations of the parties, has a right to know, by inspection of the bills of sale and assignments, what is the real amount for which the appellant has a lien on the goods. The case made by the respondent in his bill is not, as stated by the appellant's counsel, that the bills of sale were obtained by fraud. The respondent's bill charges that the appellant did not give good or valuable consideration to the duke for the goods comprised in the bills of sale, which he prays may be declared void as against him. But even if the bill charged fraud, the respondent would be entitled to production of the documents. Beckford *v.* Wildman.[4] There Lord Eldon said, "Where the object of the suit is to destroy the deed, the plaintiff has a right to have it produced for the usual purposes of inspection." So again, in Balch *v.* Symes,[5] his Lordship said, "Where a deed is sought to be impeached, the plaintiff is entitled to have it produced," &c. To the same effect is the decision in Kennedy *v.* Green;[6] and the whole doctrine of the courts of equity in respect to the production of documents is laid down by Sir Lancelot Shadwell, one of the Lords Commissioners of the Great Seal, in 1835, in the case of Hardman *v.* Ellames.[7]

The Lord Chancellor.[8] My Lords, if I conceived that this case involved the consideration of some of the arguments which have been addressed to your Lordships, and of the cases that were cited, I should think it a case of considerable importance; but in my view of the proceedings which have taken place in the court below, and before your Lordships, it does not appear to me that it is at all necessary to enter into the consideration of some of those most important questions which have been discussed. It has been properly admitted by the counsel for the appellant, that if it appeared from the whole of the pleadings that the title claimed by the appellant is in fact only a mortgage title, and that the respondent has so framed his record as to entitle him to

[1] 2 S. & S. 234.
[2] 2 Myl. & K. 732.
[3] 1 Mont. 55.
[4] 16 Ves. 438.
[5] T. & R. 92.
[6] 6 Sim. 6.
[7] 2 Myl. & K. 755.
[8] Cottenham. — Ed.

deal with that mortgage title and redeem it, the appellant would not at your Lordships' bar argue that, under the circumstances, he could resist the right of the respondent to have production of the documents. It is true the bill is not framed exactly in that form in which one usually sees bills framed which seek to make an absolute conveyance available for the purpose of securing a mortgage debt. Still, however, the equity to which the respondent is entitled may be administered on this record.

The respondent alleges in his bill that he is a judgment creditor of the Duke of Marlborough, that a writ of execution was delivered to the sheriff, that the sheriff returned *nulla bona* with respect to the property on which the respondent supposed he had a right to have his debt levied. The case made by the bill is, that at various times and by various deeds, the dates of which are mentioned, the Duke of Marlborough assigned to the appellant, without consideration, the property in question. It then alleges that, by a transaction with one Richardson, who had a title to a debt of £700 against the Duke of Marlborough, the appellant obtained possession and a title by assignment to certain property for the purpose of securing that debt. The bill challenges the legal title under the assignments, although it does not question the title of the appellant to stand in the place of Richardson, to the extent of that debt; and after so stating the case, it alleges that the respondent "now is, and has always been, ready and willing to pay to the appellant what, if any thing, is due to him from the Duke of Marlborough, upon the security of the said goods and chattels;" and then it prays "that it may be declared" [His Lordship read the prayer, and proceeded.] Now, I apprehend that if, upon the hearing, it should appear that there were assignments made by the Duke of Marlborough to the appellant without consideration, and that the appellant also had an equitable lien on the property of the duke to be affected by the respondent's execution, although the court might be of opinion that the assignments were void for want of consideration, yet the appellant having an equitable mortgage on the property, the decree of the court would be to do away with those assignments, so far as they were transfers of the property, but to let the appellant have the benefit of them for the purpose of securing the debt due to him from the Duke of Marlborough. If the record, therefore, is so framed that the respondent, being a judgment creditor, had a right to redeem the appellant, and to put himself in the place of the mortgagor, the Duke of Marlborough, it is not very material whether the bill is framed precisely in those words, and containing those statements, and that prayer, which might be the most usual and technical mode of stating such a case.

The appellant, in his first answer, says, that he holds adversely against the respondent, and says he claims to be the legal owner under and by virtue of several bills of sale, and he gives the dates; all which said bills of sale, assignments, and legal instruments, he says, were duly executed to him for a full and valuable consideration. It is impossible to read that passage in the answer without seeing that the appellant meant to represent that he was the actual purchaser; he states the deeds to be actual assignments of the property to him, and that they were assignments for a full and valuable consideration. But then, in a subsequent part of the answer, he states, "that the said duke was then indebted to the appellant as a judgment creditor and equitable mortgagee to the amount of upwards of £8000, and that all the securities which had been obtained by the appellant from the duke, and all of which were then in the appellant's possession or power, were a very scanty and insufficient security for the payment of the said debt." And then he says, "that as between the appellant and the said defendant, the Duke of Marlborough, he only claimed in equity to be a mortgagee, or to have a lien on all the said goods and chattels to secure payment of the said debt of £8000 and upwards, then due and owing to him from the said defendant, the Duke of Marlborough, and that all the said goods and chattels which were comprised in all the said bills of sale, assignments, and legal instruments, and comprising all the said goods and chattels on the said premises at Blenheim which were not heirlooms, and which did not belong to the trustees of the late Duke of Marlborough's will, were a very scanty and insufficient security for the payment of the said debt, and that the equitable interest of the defendant, the Duke of Marlborough, in the said goods and chattels in and upon the said mansion-house, estate, and premises at Blenheim was not a beneficial or valuable interest."

It was represented at the bar that the meaning of the appellant was, that although he was entitled to insist on the absolute ownership of the goods by virtue of the assignments, he was willing to consider himself as only having a charge to secure the payment of the debt. It is no wonder that the respondent, seeing such an answer, was desirous of some further discovery, that he might be able to ascertain whether the appellant had only a mortgage title, which would entitle the respondent to come into a court of equity, and place himself in the situation of the duke, so as to work out his own debt; and accordingly exceptions were taken, and in the further answer the appellant refers to a schedule containing a more accurate description of the assignments. He says, "that he, in the first schedule to that his answer annexed, and which, together with the other schedule thereunto annexed, he prayed might be taken as part of his said answer, has set forth to the best and

utmost of his knowledge, &c., an account or description of all and every the said bills of sale and assignments of the said goods, chattels, and personal estate." And he goes on with the enumeration of the particulars which he states he had set out in his answer.

In the first answer, in stating the assignments under which he claims, he sets forth, amongst others, one of June, 1829, one of June, 1832, of May, 1833, and one of June, 1833. Being called on, by the exceptions that were allowed, to state more particularly what were the nature, contents, and particulars of these assignments, he, in the second answer, swears he has done so, when it appears that there is no deed stated beyond the date of the 1st of June, 1829. Why he has omitted those three subsequent deeds he does not explain; but it appears, in his second answer, that he has sworn that he has set out all the deeds under which he claims as against the respondent; and, therefore, it must be assumed he has no other deeds but those he has so stated in the schedule. Now, if the appellant was entitled to that protection against discovery which he now seeks to enforce at the bar, the order of the Court of Exchequer was clearly wrong in allowing these exceptions, because a defendant may be bound to state in his answer and describe the documents; he may be compelled to admit he has such documents in his possession, but not compellable to state the contents, if he is entitled to protect himself by any rule which prevents a plaintiff asking for the production of the documents. If he professes to set out the document, the plaintiff has a right to see whether he has stated it correctly or not. To protect himself, therefore, against the liability to produce the document, he should take his stand on the interrogatory which asks him to set forth the particulars of the deed under which he claims. The answer would have been proper if it had said, "I have the deeds in my possession, but you do not entitle yourself, by the proceedings, to see the contents of the documents." If the defendant chooses to pretend to give a discovery, the plaintiff is not bound to take that representation, but is entitled to see the documents.

Now, I find that the schedule is an abstract of all those deeds; it is not a mere statement of such a deed, of such a date, between such parties, which would leave the respondent entirely in the dark as to the contents, but the appellant sets out what is quite sufficient for ordinary purposes, — whether truly abstracted or not is a point of which the respondent has a right to be satisfied. But when I look to the schedule, which is the most important part of the papers, and which is the only part not printed, I find a statement of the prior deeds which are immaterial from the mode in which the last deed deals with those prior deeds. The deed of the 1st of June, 1829, recites the prior deeds, and then there is the proviso as to the property comprised in those

deeds, and in this last deed it seems uncertain on the face of it whether it embraces all or not, but at all events, it is subject to the redemption of certain parts.

The last deed, which is for further security, is of August, 1832, and reciting that the now recited indentures were only "for the better securing the said sum of £1800 and interest, so due and owing to him as aforesaid, it was witnessed, that in consideration of the premises, and for better securing payment of the said sum of £1800 and interest, so due and owing from the said duke to the said Edward Latimer as aforesaid, and also in consideration of 10*s.* to the said duke paid by the said Edward Latimer at the time of executing these presents, he, the said duke, had bargained, sold, assigned, transferred, and set over unto the said Edward Latimer, his executors, administrators, and assigns, all the several cattle, wines, books, musical instruments, plants, goods, chattels, and effects, in the inventory thereunder written particularly mentioned, being in and about the mansion-house, garden, stables, grounds, and park of Blenheim, of which the said duke had delivered to the said Edward Latimer full and actual possession; proviso, that the now abstracting indenture was only intended for further and better securing the payment of the said sums of £1800 and interest, and that if the said duke, his executors or administrators, should pay, or cause to be paid, the same to the said Edward Latimer, his executors, administrators, or assigns, on the 8th day of May then next ensuing, that indenture should cease and determine."

There is, therefore, no question but that the title of the appellant on his deed is only a mortgage title, and it is equally free from doubt, according to my view of the pleadings, that the respondent is entitled to redeem that mortgage upon the payment of what may be found due, not being precluded from that right by the mode in which he states the case, the object of the deeds being not to give an absolute title to this property against the duke, or those who claim under the duke, but for the purpose of securing a sum of money due from the duke to the appellant.

On these two grounds, therefore, I think your Lordships may safely affirm the order of the court below; first, that this is a case in which the respondent is not only seeking to redeem, but is seeking to have an instrument treated as a mortgage security, which the appellant has set up as an absolute title; and, secondly, because the appellant, having set out what he states as the contents of the deed, the respondent, under those circumstances, is entitled to see whether the abstract be or not a correct abstract of those deeds of which he asks the production. I therefore think that the order of the court below ought to be affirmed, with costs.

LORD BROUGHAM. I entirely agree with my noble and learned friend that there can be no doubt in this case. If the schedule had been printed, we should have seen, earlier in the day, the points in the case, and a considerable part of the arguments might have been spared and much time saved. I ought to add that, in the cases which have been cited, there is nothing that goes against the decision. I do not think the points arise to which the arguments in those cases were mainly applied.

If, in the peculiar circumstances of this case, an application had been made to the House to forward the hearing of this appeal, the venue, I take it for granted, being in Oxfordshire, the cause might have been tried at the last spring assizes. The order appealed from was made in July, 1836; the appeal, I suppose, was lodged as early as possible; and I have no doubt that there would have been no objection on the part of the Appeal Committee, your Lordships acting on their report, to have so sped the hearing as to have enabled the parties to go on with the action at the last assizes. I have no doubt that the application would have been granted if made.

The order of the court below was affirmed, with costs.

STOREY v. LORD JOHN GEORGE LENNOX.

BEFORE LORD COTTENHAM, C. AUGUST 4, AND NOVEMBER 4, 1836.

[*Reported in* 1 *Mylne & Craig*, 525.]

IN the month of August, 1832, the defendant insured, in the office of the Pelican Life Insurance Company, the life of Edmund Meysey Wigley Greswolde, then major of the sixth regiment of dragoons, for the sum of £5000 for seven years. The declaration subscribed on behalf of the defendant, and upon which the insurance was made, stated that Major Greswolde had never been seriously ill since a child, that his general state of health was very good, that he was then in perfect good health, that he had not been, and was not, subject to fits, and that his habits of living were sober and temperate; and the defendant declared that he had not concealed any fact material to be known to the assurers. The policy of assurance contained a proviso for making it void if the declaration should turn out to be in any respect untrue.

Major Greswolde died at Cahir, in Ireland, on the 6th of January, 1833. The Pelican Life Insurance Company having refused to pay to the defendant the amount of his insurance, he, on the 26th of March, 1836, commenced an action for the recovery of it against the plaintiffs, as being three of the directors of the company, and as being the persons who had subscribed the policy. The plaintiffs thereupon filed the present bill of discovery in aid of their defence to the action, and for an injunction in the mean time.

The bill specified various particulars in which it alleged that the declaration was untrue, and charged the defendant with knowledge of such particulars at the time at which the declaration was made. The bill charged that the defendant, his solicitor or agents, then or lately had, in his or their possession, custody, or power, divers deeds, certificates of medical men, documents, accounts, books, letters, papers, and writings, whereby the truth of the matters and things thereinbefore mentioned, or some of them, would appear; and it charged that he should set forth a list of such particulars, and should leave them in the hands of his clerk in court for the usual purposes.

The answer contained the following passage: "And this defendant further answering saith he hath in his possession or power the several letters and other papers mentioned and enumerated in the first schedule to this his answer annexed, and which he prays may be taken as part thereof, but this defendant saith that on or about the 9th day of February, 1833, this defendant received a letter dated the 5th day of February, containing information that since the death of the said E. M. W. Greswolde a professional gentleman from London had, on behalf of some or one of the insurance companies with whom policies of insurance had been effected on the life of the said E. M. W. Greswolde, been at Cahir, for the purpose of obtaining evidence as to the health and habits of the said E. M. W. Greswolde; and this defendant from that time, by reason of that information, considered it possible that the said complainants, and the other insurance companies with whom policies had on this defendant's behalf been effected on the life of the said E. M. W. Greswolde, had it in contemplation to dispute their liability to pay this defendant; wherefore this defendant, from that time down to the times at which this defendant brought his aforesaid action against the said complainants, and actions against the other companies aforesaid, contemplated the bringing actions against them to compel them to pay their several policies aforesaid, if they should refuse doing so. And this defendant saith that the several letters and papers mentioned and enumerated in the first schedule hereto annexed are and contain information furnished to this defendant, as to evidence which can be procured or given on this defendant's behalf against the said complainants and the said insurance offices aforesaid, and that the producing the same, or any part of them, to the said complainants, or permitting the said complainants to inspect the same or any of them, might disclose the names of witnesses intended to be examined, and evidence intended to be given, on behalf of this defendant in the aforesaid action of this defendant against the said complainants, and in the other actions aforesaid, and in the present suit. And this defendant humbly submits he ought not to be compelled to produce any of the letters and papers mentioned and enumerated in the first schedule hereto. And this defendant further saith that, exclusive of and besides the several particulars mentioned and enumerated in the first schedule hereto, he hath in his possession or power the several particulars mentioned and enumerated in the second schedule hereto, and which he prays may be taken as part thereof; and he saith that save as aforesaid, and excepting the same particulars mentioned and enumerated in the schedules to this his answer annexed, he hath not, and to the best of his recollection and belief never had, in his possession or power, or in the possession or power of his

solicitors or agents, any deeds or deed, documents or document, certificates or certificate of medical men, accounts or account, books or book, letters or letter, papers or paper, or writings or writing, relating to or touching or concerning the matters in the said bill of complaint mentioned, or any of those matters, whereby the truth thereof, or of any of them, would appear."

The first schedule to the answer enumerated the following documents, viz.: various letters to the defendant from Mr. Callow and Mr. Knott, the surgeon and assistant-surgeon of the regiment, and from Major Ratcliffe, the major of the regiment, and from the defendant's solicitors, and from other persons, of various dates, from the 5th of February, 1833, to the 21st of May, 1835; "a certificate or affidavit" of Messrs. Callow and Knott, and, under the date 24th of February, 1833, "a statement or report of the said William Knott as to the general health of said E. M. W. Greswolde," and under the date 4th of March, 1833, "a copy of a certificate from the said Mr. Knott about this time, and of his correspondence with Mr. W. J. Lewis as to the health of said E. M. W. Greswolde;" a copy of the defendant's answer to one of the letters addressed to him; and letters from different persons to third parties; "a statement prepared for the opinion of defendant's counsel in or about July, 1833, after the said insurance offices had refused payment to defendant of the moneys assured by them on the life of said E. M. W. Greswolde;" the copy of an opinion of one counsel, and a statement and opinion thereon of another counsel; and a form of notice served by the defendant's desire upon the insurance offices, claiming interest on the moneys payable to him. The defendant added that there were, as he believed, in the possession of his solicitor, divers pleadings, papers, statements, letters, and instructions laid before counsel for advice, preparatory to the institution and during the progress of the litigation between the defendant and the several offices of assurance upon whom the defendant had claims.

The second schedule enumerated — besides letters to the defendant from his solicitor, and from Major Ratcliffe — a bond and deed of covenant given to the defendant by Major Greswolde to secure £11,000 and interest; the policy of assurance; a certificate of Major Greswolde's baptism, and a copy of a certificate of his death; a draft letter to the secretary of the Pelican Insurance Company, and a letter from such secretary to the defendant's solicitor; a draft affidavit as to Major Greswolde's identity.

Upon a motion being made before the Master of the Rolls, for the production of the several deeds, letters, papers, and writings admitted by the defendant's answer, and by the schedules thereto, to be in his custody, possession, or power, his Lordship ordered the defendant to

produce "the several deeds, letters, papers, and writings mentioned and set forth in the schedules to the answer, other than and except the letters written to and from the solicitors of the parties in this cause, or either of them, and the statements prepared for the opinions of counsel, and the opinions of counsel thereon in the said answer mentioned, and admitted by the said defendant by his said answer to be in his possession."

The defendant now moved to discharge the order made at the Rolls.

Mr. *Swanston* and Mr. *Lovat*, in support of the motion. It appears, upon the face of the answer, that some of the documents which the defendant would be obliged to produce under the Master of the Rolls' order, constitute the evidence of the defendant's title; and, therefore, the plaintiffs are not entitled to see them. In Preston *v.* Carr,[1] the Court of Exchequer refused to order production of documents, upon the ground that they would disclose the names of witnesses, and the substance of their testimony. The court protects not only such documents, but also documents which have come into existence either in the course of a pending litigation, or after it has been contemplated, or even after a dispute has occurred which may be reasonably supposed to lead to litigation. Vent *v.* Pacey;[2] Curling *v.* Perring.[3] In the latter case, a motion was made before your Lordship, as Master of the Rolls, for the production of certain letters addressed by the defendant's solicitor to a third party, and the answers of such third party; the correspondence having taken place after the dispute, which was the subject of litigation, had arisen. The application was refused with costs, and your Lordship said that "if the right of inspecting documents were carried to the length contended for by the plaintiff, it would be impossible for a defendant to write a letter for the purpose of obtaining information on the subject of the suit, without the liability of having the materials of his defence disclosed to the adverse party." It is impossible that any decision can be more precisely applicable to the present case than Curling *v.* Perring. No distinction can be made between correspondence passing between a defendant himself and third parties, and correspondence passing between his solicitor and third parties; that is clear from the words used by your Lordship in Curling *v.* Perring. The answer does not admit that the documents in question prove the plaintiffs' case, but, on the other hand, it says that they constitute the defendant's evidence.

Mr. *Wigram* and Mr. *Richards*, contra. In all the cases of privileged documents, except Preston *v.* Carr, a solicitor has been con-

[1] 1 Younge & Jer. 175. [2] 4 Russ. 193. [3] 2 Myl. & K. 380.

cerned. That case is in a great degree inconsistent with Whitbread v. Gurney,[1] which was frequently before Lord Lyndhurst; but it is quite clear that the facts in Preston v. Carr do not warrant the conclusion drawn from it. Neither Vent v. Pacey nor any other case has decided that documents which have come into existence before the commencement of litigation, but after it was contemplated, shall be protected upon that ground merely, when they would not otherwise be protected. Communications between a party and his counsel or solicitor are protected, because such communications must necessarily be very often of the most confidential character; but the privilege has never been extended to a party's communications with any other person. The same rule would apply here as at *nisi prius*, by which even a solicitor is bound to communicate all that he learns otherwise than for the purpose of a cause or suit. Williams v. Mundie.[2] In Greenough v. Gaskell,[3] Lord Brougham says, "The party has no general privilege or protection; he is bound to disclose all he knows and believes and thinks respecting his own case;" and "to compel him to disclose what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery."[4]

It is not necessary, in order to entitle the plaintiffs to a production of documents, that the defendant should in his answer admit that they will make out the plaintiffs' case. The rule on this subject was laid down by Sir John Leach in Tyler v. Drayton,[5] in which case he said that "where a defendant referred to his schedule as containing all deeds, papers, &c., in his custody or power relating to the matters in question, there the plaintiff was entitled to the inspection of all such deeds, papers, &c., as of course, unless it appeared by the description of any particular instrument in the schedule, or by affidavit, that it was evidence, not of the title of the plaintiff, but of the defendant, or that the plaintiff had otherwise no interest in its production." It is a necessary inference, from the statements in the present answer, that the documents in question relate to the plaintiffs' case; and that is sufficient. It is true that the charge in the bill that the documents in the defendant's possession relate to the plaintiffs' case has not been answered; but it is enough for the plaintiffs to show, by reference to the documents, as described in the answer and the schedule, that they are relevant to the plaintiffs' case. This is not a cause in which the defendant sets up a separate and distinct case of his own; but the case of the plaintiffs and the defendant is one and the same throughout; one and the same question is to be tried,

[1] 1 Younge, 541. [2] Ry. & Moo. 35. [3] 1 Myl. & K. 98.
[4] 1 Myl. & K. 101. [5] 2 Sim. & Stu. 309.

namely, whether the life was insurable; and the documents which relate to the defendant's case are relevant to the plaintiffs' case also.

It is to be observed that the defendant asks for protection only upon the ground that the documents might disclose evidence intended to be given on his behalf; he does not suggest that such evidence will be given. He admits himself that the documents are material to the question to be tried. In every bill of discovery filed in the Exchequer in aid of trials upon policies of marine insurance there are charges as to the names of the crew, and interrogatories framed for the purpose of getting at the names, in order that the persons who have formed the crew may be examined as witnesses.

Mr. *Swanston*, in reply. It is true that it appears from the description of the documents given in the first schedule that two of them relate to the state of Major Greswolde's health, but they may not relate to the state of his health at the time at which the insurance was effected; and if they do not, they are not material to the plaintiffs' case. Lord Tenterden's decision, in Williams *v.* Mundie,[1] underwent a minute scrutiny in Greenough *v.* Gaskell,[2] and was then found to be inconsistent with other decisions made by his Lordship himself. A case laid before counsel is protected if prepared in contemplation of litigation, but not otherwise; a distinction which shows that the principle of protection is that of precluding one party from going to trial with the other's evidence; and that principle is equally applicable to the present case.

November 4.

The Lord Chancellor [after stating the case made by the bill, and the passages in the answer and the schedules]. When this motion was argued before the Master of the Rolls, it seems to have been assumed that there was a sufficient admission on the part of the defendant to entitle the plaintiffs to move for a production of the papers in question, and a sufficient statement by the defendant to entitle him to resist the production, upon the grounds insisted upon in the argument; no question upon either of these points appearing to have been made before the Master of the Rolls.

When the motion was argued before me by way of appeal, it occurred to me that there might be some doubt whether the answer contained a sufficient admission to entitle the plaintiffs to move for the production of the documents in question. To entitle the plaintiffs to an order for that purpose, they must show an admission that the documents which they seek to inspect are in the possession of the defendant, and that they are of a nature to entitle the plaintiffs to an inspection of them. And where an answer is framed so as to meet the

[1] Ry. & Moo. 85. [2] 1 Myl. & K. 98.

form of words commonly used in the interrogatory for that purpose, no question of this kind can arise; but in this case the defendant has not answered the interrogatory, except by making his statement as to the documents in the two schedules, and then denying, in the words of the interrogatory, the possession of any others. So that it is by implication only, and not by any direct admission, that the plaintiffs can show from the answer that the documents fall under the description contained in the answer.

Upon examining, however, the passage in the answer referring to the schedules, and the schedules themselves, I think that there are sufficient admissions that the documents in question are such as the plaintiffs, according to the ordinary rule, are entitled to inspect. The description of the documents themselves in the schedules is, in many instances, sufficient for that purpose, and as to others, the passage in the body of the answer referring to the first schedule says that the letters and papers mentioned and enumerated in the first schedule are and contain information furnished to the defendant as to evidence which can be procured or given on the defendant's behalf against the plaintiffs. There is, therefore, an admission that all the papers relate to the subject-matter of the bill, and that being so, the plaintiffs are entitled to inspect them, unless the defendant has by his answer stated circumstances which entitle him to be protected against the operation of the ordinary rule.

Now, the ground upon which the defendant insists that the plaintiffs ought not to inspect these documents, is to be found in the next passage in the answer, in which he says that the producing the same, or any part of them, to the plaintiffs, or permitting the plaintiffs to inspect the same or any of them, might disclose the names of witnesses intended to be examined, and evidence intended to be given on behalf of the defendant, in the said action of the defendant against the plaintiffs, and in the other actions aforesaid, and in the present suit; which suit, it is to be observed, is a bill of discovery in aid of a defence to an action at law.

The plaintiffs, moving upon this answer, must undoubtedly take as true what the defendant alleges relative to the subject-matter of the motion; but care must be taken that the defendant be not permitted by a general allegation to defeat the plaintiffs' right, without incurring the danger which attends a false allegation in an answer. If this were to be permitted, it would indeed afford the means of overturning a most important part of the protection which this court affords to the rights of parties. The protection, on the ground of professional confidence, is not set up in the body of the answer, and is only to be inferred from the description of the documents in the schedule itself. The defendant has set up no defence against the production, unless the

proposition can be maintained that a plaintiff is not entitled to inspect any document which is and contains information furnished to the defendant, as to evidence which can be produced or given on the defendant's behalf against a plaintiff, the producing of which to the plaintiff might disclose the names of witnesses intended to be examined, and evidence intended to be given, on behalf of the defendant in the action. Can it be said that every document of which this can truly be affirmed is a privileged document? Suppose, for instance, that some of the letters in the schedule contained a statement, without any inquiry on the part of the defendant, of circumstances relating to the life insured, which would show that it was not an insurable life, and showing that the plaintiff at law knew such to be the case, and had admitted it, but stating that some medical person named had been heard to express an opinion favorable to the case of the plaintiff at law, or some fact tending to repel such a conclusion, — such a letter or document would answer the whole of the description in the answer; but it could not be said that the plaintiffs in equity had no right to any information as to such a document.

The proposition raised at the bar was this, that it had been decided that a defendant is not bound to produce, for the inspection of his opponent, what may have passed between himself and any professional adviser, relative to the matter in contest, though before any litigation had commenced, provided that what so passed was in contemplation of expected litigation; that a party engaged in litigation is not bound to employ professional assistance, and still less when litigation is only expected; that a party, therefore, acting for himself, and corresponding with others with a view to actual or expected litigation, ought to be equally protected against being compelled to reveal the result of his inquiries. Were I to give any opinion upon this proposition, it would be wholly extra-judicial; for I think that, supposing it to be capable of being supported, the defendant has not in this case so raised the defence by his answer as to entitle him to the benefit of it.

The Master of the Rolls has by his order protected the defendant from producing any communications between himself and his professional advisers; and I am of opinion that he has given to the defendant the full benefit to which he is entitled.

Upon the ground, therefore, that the answer contains sufficient admissions that the documents in question so relate to the matters in issue as to entitle the plaintiff to an inspection of them, according to the ordinary rule, and that it does not contain any statement sufficient to entitle the defendant to protection against the operation of the ordinary rule, I am of opinion that the order of the Master of the Rolls is right, and that the motion to discharge it must be refused with costs.

BOWES v. FERNIE.

BEFORE LORD COTTENHAM, C. MARCH 10, 1838.

[*Reported in* 8 *Mylne & Craig*, 682.]

THE bill was filed for an account of certain pecuniary dealings and transactions, in which the defendants had been concerned with the late Lord Glamis. The defendant Fernie was an accountant, who had acted for a number of years in the capacity of receiver of Lord Glamis's estates, and generally in the management of his affairs. By his answer he admitted that he had in his possession certain deeds, documents, books, and accounts which related exclusively to the matters in question in the cause, and which he particularized in a schedule; and that he had also in his possession divers other books and ledgers (specified in the same schedule), which contained some entries relating to those matters, but which likewise contained many entries relating to other and distinct matters, and to which he had daily occasion to refer in the course of his ordinary business; and he submitted that no inspection of such books and ledgers ought to be given.

With respect to the deeds, documents, books, and papers, to the inspection of which no objection was suggested by the answer, the Vice-Chancellor, on the 8th of June, 1837, made the common order for their production; and he further ordered that the plaintiff's clerk in court, or solicitor, should be allowed to inspect and take extracts from the other books and ledgers at the defendant's office, upon giving a day's notice of his intention, with liberty to the defendant to seal up, upon oath, all such parts of them as did not relate to any of the matters in question in the cause.

Accordingly, the plaintiff's solicitor, in the months of August and September, 1837, inspected the last-mentioned books and ledgers in the defendant's office, the defendant having previously fastened up certain parts of them, and made an affidavit that he had fastened up such parts only as did not relate to any matters in question in the cause.

The plaintiff afterwards moved that a more extensive inspection of those books and ledgers might be granted.

The affidavit of the plaintiff's solicitor, filed in support of the motion,

stated, amongst other things, that the ledgers which were produced to the deponent, under the order of the 8th of June, 1837, had certain parts of them sewed up or fastened up, and that each of them contained an index to the contents, which index was one of the parts so fastened up, so that the deponent was unable to see by the index what accounts relating to the affairs of Lord Glamis were entered in such ledger, although the deponent believed that such indexes, if open to inspection, would be found to contain references to those accounts. The affidavit further stated that all the items in the cash-book marked E., as well receipts as disbursements, appeared, as in the customary method of book-keeping, to have been posted into certain pages in the defendant's ledgers, the numbers of those pages being entered opposite to the items in the cash-book; and that on reference to the corresponding pages in the ledgers it appeared that many of such items were so posted accordingly, but that others of them appeared to be posted into pages of the ledgers which were fastened up and not open to inspection, and that several of such last-mentioned items (which the affidavit specified) were entries relating to the accounts of Lord Glamis.

The defendant Fernie, by an affidavit in reply, stated that the indexes of the ledgers contained nothing relating to any of the matters in question in the cause, except the numbers of the pages in the ledgers, and that those pages themselves were left open. He further deposed that the entries in the cash-book marked E. were not entered or posted in any ledgers or books in his possession, except in a ledger marked K., which had been left entirely open to the inspection of the plaintiff's solicitor, and which was kept by the deponent expressly for the accounts between himself and Lord Glamis; and that the deponent kept such part of the accounts as related to Lord Glamis's estate at Redburn, and to various other receipts and payments made on his account, in another book, which was taken away by Lord Glamis in 1833, and retained. He further deposed that such entries in the cash-book E. as were not to be found posted in ledger K. referred to the book so retained.

In a second affidavit, the defendant specified the particular pages which he had sewed up in his several account-books and ledgers. In the ledger marked H., he stated that he had, among other pages, sewed up from page 1 to page 45, and in the ledger marked I. from page 1 to page 68, both inclusive, and that in none of the pages of the said several books so sewed up was contained any entry relating to the matters in question in the cause. In accordance with this affidavit, the indexes, and also several pages which had on former inspections been fastened up in the body of the ledgers, were now left open.

By a subsequent affidavit of the plaintiff's solicitor it appeared that upon an inspection had by him in August, 1837, pages 35, 36, and 37 of ledger H., and page 48 of ledger I. (which were now fastened up), were open on that occasion, and that they then contained entries relative to the matters in question in the cause. The defendant, by an affidavit in answer, admitted the fact, but stated that the pages specified had been afterwards accidentally closed, in consequence of the leaves having been inadvertently fastened up to a wrong page, and that immediately on discovering the mistake he had proceeded to rectify it.

Upon these affidavits, the Vice-Chancellor made an order, referring it to the Master to open and inspect the several books and ledgers last mentioned, and report what parts of them, if any, ought not to be inspected by the plaintiff, and to seal up such parts only; and further, that the defendant should produce and leave the same books and ledgers in the Master's office, as the Master should direct, but the plaintiff and her solicitor were not to inspect them without the Master's permission.

The defendant Fernie now moved that this order might be discharged.

Mr. *Simpkinson*, for the motion. The Vice-Chancellor proceeded upon the ground that the four pages which are now sealed up were open in August, 1837, and are sworn by the plaintiff's solicitor, and not denied by the defendant, to have then contained entries relating to matters in question in the cause, a circumstance which raised such a degree of suspicion as, in his Honor's opinion, warranted the reference to the Master. Suspicion, however, is no sufficient ground, in a case of this description, for inducing the court to subject the whole of a tradesman's books and ledgers to the inquisitorial scrutiny of a Master. How is the Master to carry the order into effect? Is he to undertake the labor of wading through all the entries and accounts contained in these voluminous books and ledgers? The affidavit of the party is in this stage quite conclusive. Napier *v.* Staples;[1] Purcell *v.* Macnamara;[2] Campbell *v.* French.[3] The defendant's affidavits are merely supplementary to his answer, so that this is in fact a proceeding upon the answer; as to which Lord Eldon has held, and it is perfectly settled, that the statements in the answer, though open to the strongest suspicion of incorrectness, or even perjury, must, nevertheless, for the purposes of a motion founded upon it, be assumed to be true. Clapham *v.* White.[4]

Sir *W. Horne* and Mr. *Lovat*, contra. The Vice-Chancellor's order was grounded upon this, that a defendant shall not be permitted to

[1] 2 Moll. 270.
[2] Stated in Wigram on Discovery, p. 209.
[3] 1 Anst. 58.
[4] 8 Ves. 35.

contradict himself. If he does, the court refers it to the Master to inquire into and state how the fact stands. If, therefore, he falsifies his own answer or his own affidavit, an inspection will be directed to be had, qualified in the manner which has been directed here. The principle of the cases referred to is, that you shall not be permitted to contradict, by extrinsic evidence, the statement of the party himself; but that principle does not apply where, to use the gentlest expression, the defendant has convicted himself of gross incorrectness and inconsistency.

The Lord Chancellor. If the practice of the court, or any precedent, had been found to authorize such an order as the present, I should feel no disinclination to support it, for certainly the circumstances are most suspicious, and the defendant's statements any thing but satisfactory. On the face of them, it was clear that the indexes must have related to the matters in question in the cause, and that fact is not now denied; and I should, therefore, have no hesitation in giving as much discovery as, consistently with the practice, I could give.

So far as the defendant's affidavits contain statements at variance with each other, or so far as the document itself shows a discrepancy in his statements, it would be quite consistent with the rules of the court to get at the truth by compelling the party to give discovery; and if there be now any matters which are open to that observation, either from contradiction in the affidavits or from the character of the entries themselves, I am ready to make the order for inspection to that extent; but it is quite new to me, and no authority has been produced for holding, that an order of this sort may be directed upon an answer. It is not because you suspect that a defendant has stated facts incorrectly or untruly in his answer that you are at liberty to disregard those statements. If, with respect to a particular matter, a defendant has made inconsistent and contradictory statements, the plaintiff may adopt and act upon that which is most in his own favor. But his answer may be open to every possible suspicion, and yet, according to the practice, the court cannot reject it.

I do not think that the order can be maintained in its present shape; but as it was open to the Vice-Chancellor, upon the motion before him, to order the production and inspection of any books or accounts, as to which the defendant had made contradictory statements, or as to which the documents themselves showed a discrepancy, let any such be pointed out to me now, and I will order them to be inspected. It seems to me, however, now that access has been given to the indexes and to the four pages formerly open in ledgers H. and I., the plaintiff has got all she can require.

BANNATYNE v. LEADER.

BEFORE SIR LANCELOT SHADWELL, V. C. JULY 6 AND 8, 1839.

[*Reported in* 10 *Simons*, 280.]

THE plaintiffs were the assignees of John Maberly, a bankrupt, who, prior to his bankruptcy, had carried on the business of a linen manufacturer in copartnership with John Baker Richards, since deceased. On the 9th of May, 1831, Maberly sold his share of the business and the property belonging thereto to the defendant Leader; but the dissolution of the partnership between Maberly and Richards, and the formation of the new partnership between Richards and Leader, was not advertised in the Gazette until the 3d of January, 1832. The advertisement, however, was dated on the 9th of May, 1831. On the 26th of January, 1832, the fiat issued under which Maberly was declared a bankrupt. The object of the bill was to set aside the sale, on the ground that the property sold was allowed by Leader to remain in the order and disposition of Maberly at the time of his bankruptcy. The bill alleged that from and after the 9th of May, 1831, and thenceforward up to and from and after the 1st day of July, 1831, when an indenture of assignment therein set forth was executed by Maberly, and when he committed an act of bankruptcy by executing the same, the linen manufactories and business, by the consent and permission of Leader, were and continued to be carried on by Maberly and Richards in the same manner as the same had been before carried on; and that by the consent and permission of Leader the same continued to be carried on under the old style or firm of Maberly & Co.; and that by the consent and permission of Leader the same were so carried on until the 3d day of January, 1832, as thereinafter mentioned, and as if Leader had no share or interest in the same. The bill charged, in the usual manner, that the defendant had in his custody divers books of account, books, ledgers, &c., relating to the matters contained in the bill, and whereby the truth of them, or some of them, would appear; and particularly whereby it would appear that Maberly had committed, on the 9th of May, 1831, and on the 1st of July, 1831, and on other

days, acts of bankruptcy prior to the 31st of December, 1831; and that Leader ought to set forth a list of all such statements, &c.

Leader, in his answer, positively denied all the allegations and charges in the bill upon which the plaintiffs founded their title to the relief prayed. He said that during the treaty for the purchase, and when the agreement for the same was come to, it was proposed by Maberly to the defendant and John Baker Richards that the name or style of the firm of Maberly & Co., under which the linen manufactories and the establishments therewith connected had been carried on, should not be changed, or the retirement of Maberly from the business be publicly announced or published in the Gazette, until after the 31st of December, 1831, and that the defendant and J. B. Richards acquiesced in such proposal, by reason of Maberly stating that an earlier publication of the dissolution of the partnership would be prejudical to his return, on the then expected dissolution of Parliament, for the borough of Abingdon, which he then represented, and that it might cause a run upon his banks in Scotland before he got the necessary funds to meet it, and which he should be enabled to do by means of the securities proposed to be released and the money to be paid by the defendant; but that on the 9th of May, 1831, Maberly and Richards signed their names to the following memorandum at the foot of the agreement of the 9th of May, 1831: "The partnership hitherto subsisting between the undersigned as linen manufacturers, under the firm of Maberly & Co., is dissolved by mutual consent;" that the plaintiffs, as Maberly's assignees, brought an action of trover in the Court of Common Pleas against the assignees under the indenture of the 1st of July, 1831, for the purpose of trying the validity of the assignment; that, at the trial of the action in July, 1833, a verdict was found for the defendants, and thereby the validity of the indenture was established as against Maberly's creditors and assignees; and it was also established that the making of the indenture was not an act of bankruptcy, and that it was not executed in contemplation of bankruptcy. Leader, in his answer, further stated that there were, in the joint custody of himself and of the other defendants (who had become entitled to Richards's share in the partnership), several documents, &c., relating to the matters mentioned in the bill, but that the truth of such matters, as he believed, did not thereby appear, further or otherwise than as they were therein stated; and that he believed that it did not appear, by such documents or any of them, that Maberly had committed on the 9th of May, 1831, and on the 1st of July, 1831, or on either of such days, or on any other days, any acts of bankruptcy prior to the 1st of January, 1832; and that he had set forth a list of such documents in the second schedule to his answer.

Mr. *Jacob* and Mr. *G. Richards*, for the plaintiffs, now moved that

those documents might be produced. They said that the books and other documents moved for were connected with the trade from 1825 down to 1837; that the production of them was essential to the purposes of the suit in order to show what the trade was, and how it was carried on, and particularly to show what was done between the date of the agreement and the time when the dissolution of the partnership between Maberly and Richards, and the formation of the partnership between Richards and Leader, was announced to the world by the advertisement in the Gazette.

Mr. *Knight Bruce*, Mr. *Barber*, and Mr. *Walford*, appeared for Leader; and Mr. *Wigram* and Mr. *Reynolds* for the other defendants who claimed under Richards.

The question is whether a person claiming to be a partner is entitled to see the books of the partnership, before it has been determined whether he is a partner or not.

If the title of the plaintiff is denied by the answer, that denial gives the defendant the same benefit with respect to all subordinate matters as he would have had if he had pleaded to the bill. The allegation that the assignment of the 1st July, 1831, was an act of bankruptcy, and all the other statements and charges on which the plaintiffs found their title to the relief asked, are expressly denied by the answer. Besides, all question as to the assignment having been an act of bankruptcy was set at rest by the verdict in the action of trover. If the title of the plaintiff is denied by the answer, he is not entitled to the production of any of the documents in the defendant's custody, except such as will show his title. The Lord Chancellor so decided in —— *v.* Flint;[1] but a still more important case on the same subject has been lately decided by the same learned judge. Adams *v.* Fisher.[2] If it had been alleged that the documents to which the motion relates proved the act of bankruptcy, then the plaintiffs might have been entitled to see them; but what the documents are wanted for is to show that the property sold to Leader was in the order and disposition of Maberly on the 3d of January, 1832; but, until the plaintiffs have shown that Maberly was a bankrupt on that day, they have no right whatever to question the transaction between him and Leader.

If a person claiming to be a creditor of a testator files a bill against the executor for the purpose of obtaining payment of his debt, and the executor, in his answer, denies the debt, can the plaintiff move to have money belonging to the testator's estate, admitted by the executor to be in his hands, paid into court.

The documents sought to be produced are in the joint custody of

[1] Not reported. [2] 3 Myl. & Cr. 526. See 542 *et seq.*

Leader and the other defendants: consequently no order can be made on the motion which will not affect those other defendants as well as Leader; but there is no privity whatever between the plaintiffs and those defendants who claim under Richards.

The cases of Taylor *v.* Milner,[1] Atkyns *v.* Wright,[2] and Fenwick *v.* Reed,[3] were referred to by Mr. *Reynolds*.

Mr. *Jacob*, in reply, said that in Adams *v.* Fisher the Lord Chancellor proceeded on the ground that the documents were not material to be produced in order to enable the plaintiff to get a decree; that they were not material to show the connection which existed between Adams and Fisher; and he referred to the last paragraph of the judgment, in page 546 of the report.

The VICE-CHANCELLOR, in the course of the argument, said: I do not see any sort of admission in the answer that the documents, if they were produced, would prove one single allegation in the bill.

Let me put this case: Suppose that a person claiming to be a creditor of a testator had filed a bill against the executor, and said that he was a creditor, and that the executor had got in his possession all the papers and writings that ever belonged to the testator, and, if they were produced, it would appear that he was a creditor; and that the executor, by his answer, denied the assertion that the plaintiff was a creditor, and, moreover, went on to state that he had all the papers of the testator in his possession, but denied that any of them would make out the fact that the plaintiff was a creditor, — could this court order all or any of those papers to be produced? And yet it is perfectly possible that it might be all fallacious, and that the documents, if they were produced, would prove the plaintiff's case.

July 8.

The VICE-CHANCELLOR. What influences my mind most is that passage in the answer in which the defendant has not, in my opinion, averred with sufficient positiveness that the documents would not make out the plaintiff's case. I confess that though, for many purposes, what a defendant states on his belief is considered as substantially putting the fact in issue, yet where the question depends on the materiality of the documents with respect to their contents, if the defendant does not choose to swear positively, as he might and as he would be perfectly justified in doing if he had read them through and was satisfied in his own mind that they did not contain that which would make out the plaintiff's case, but thinks proper to admit the documents to be in his

[1] 11 Ves. 41. [2] 14 Ves. 211. [3] 1 Mer. 114

possession, and then to state (in the manner in which this defendant has done) that he merely believes that they will not make out the plaintiff's case, I cannot but think that the defendant does place the matter in such a situation as to make it consistent with the fair investigation of the truth and justice of the case that the documents should be produced. And it is, therefore, on account of the particular mode in which this answer is framed that I think the books ought to be produced.

JACKSON v. SEDGWICK.

BEFORE LORD ELDON, C. AUGUST 4, 1819.

[*Reported in* 2 *Wilson's Chancery Cases*, 167.]

MR. ROUPELL moved, on behalf of the defendants, that the plaintiffs might produce and leave with their clerk in court certain drafts or sketches of accounts referred to in the bill, for the inspection of the defendants.[1] In the case of The Princess of Wales *v.* The Earl of Liverpool,[2] it was decided that it is competent to a defendant to apply to the court for a production of papers by a plaintiff. The plaintiffs mention these sketches in their bill, and it is to be inferred that they are in their possession. The defendants had put in their answer.

Mr. *Hart*, contra, was stopped by the court.

The LORD CHANCELLOR. This case is very different from the case referred to. The order there made was that the defendants should not be called on for an answer until a limited time after the production of the documents, on an affidavit that the defendants could not answer the bill satisfactorily till they had seen the papers. This is an application founded on the mere circumstance of the plaintiffs' having mentioned the papers in their bill, for the bill does not state that they are in their possession. The general rule of the court is that a defendant cannot have an order for production by a plaintiff. In the case which has been cited, the general rule gave way, on the authority of the Practical Register, one of the oldest and most respectable books on the practice of this court. It appeared to me, on the authority of that work, that if a defendant swears that he cannot safely put in his answer without a production of papers which the plaintiff has stated in his bill, the court would give him time to answer till there should be a production of the papers. But suppose the plaintiff has stated the papers in his bill, and the defendant puts in his answer without calling for an inspection of them, he cannot afterwards require it. I cannot order a person to produce papers without its being shown that those papers are in his possession. The defendants must file a cross-

[1] See the case stated, 1 Wils. C. C 297. [2] 1 Wils. C. C. 118.

bill. The court would be placed in a singular situation if, after having committed the plaintiffs for not producing the papers, it should afterwards appear that they were not in their possession.

Motion refused, with costs.

JONES *v.* LEWIS.

BEFORE SIR JOHN LEACH, V. C. MARCH 14, 1825.

[*Reported in 2 Simons & Stuart, 242.*]

THE bill was filed for the specific performance of an agreement alleged to have been made by Rees Price, deceased, on the plaintiff's marriage with one of his daughters, for the conveyance of an estate to the plaintiff, but which, by a will made subsequent to the date of the alleged agreement, he had devised to the defendants.

The defendants now moved that the plaintiff might, within a week, leave the agreement in the hands of his clerk in court for their inspection, and that they might have three weeks further time to answer, after inspecting the agreement.

This motion was supported by an affidavit made by the defendants, one of whom was a daughter of the testator, and had lived with him, in which they deposed that they had never heard, and did not believe that the testator had ever entered into any such agreement; that they believed it to be a forgery; and that they were unable fully to answer the bill, without first of all being permitted to have an inspection of the agreement.

Mr. *Lynch*, in support of the motion, relied on The Princess of Wales *v.* The Earl of Liverpool.[1]

Mr. *Horne*, contra, said that the case cited was an exception to the general rules of the court; and that a party could not be compelled to give a discovery without having an opportunity of stating, at the same time, his own case upon the record.

The VICE-CHANCELLOR. The doctrine that the plaintiff must produce an instrument stated in his bill, previous to the defendant's answering the bill, where it is plainly necessary to enable the defendant to make a full defence, is recognized in the case of The Princess of Wales *v.* The Earl of Liverpool, and had been previously laid down in the Practical Register,[2] and is obviously required by the first principles of justice.

[1] 1 Swanst. 114. [2] See p. 161.

The affidavit filed upon this application, where it is sworn that the instrument is believed to be forged, establishes the necessity in the present case.

Take the order that the defendants have a fortnight's time to answer after the plaintiff shall have left the agreement in the hands of his clerk in court.[1]

PENFOLD v. NUNN.

BEFORE SIR LANCELOT SHADWELL, V. C. NOVEMBER 22, 1832.

[*Reported in* 5 *Simons*, 405.]

THE bill, which was filed in June, 1832, stated that the plaintiff accepted, for the accommodation of J. S. Penfold, a bill of exchange for £300, dated September 21, 1829, and payable three months after date, and which J. S. Penfold delivered to the defendant to be discounted by him; and that the defendant had lately brought an action on the bill against the plaintiff. The bill charged that the bill of exchange was, when due, in Penfold's hands, and was never discounted by the defendant; and, as evidence thereof, that in a bill account, a copy of which was annexed to the bill, sent by the defendant in May, 1831, to Penfold or his agent, no mention was made of the bill in question, nor, at that time, had any sum been paid or advanced in respect thereof; that bills for the balance of the account were given by Penfold's father to the defendant, and thereupon all the bills mentioned in the account, and which were all the bills in respect of which any claim was made by the defendant, were delivered up to Penfold's father to be cancelled. The bill prayed for a discovery and an injunction to restrain the action, and that the defendant might deliver up the bill of exchange to be cancelled.[2]

The defendant now moved that the plaintiff might be ordered to produce for his inspection the bill account, a copy of which was annexed to the bill, and also the bills of exchange which the defendant delivered up when he furnished the account; and that further time might be allowed him for putting in his answer. The motion was supported by an affidavit, in which the defendant deposed that he believed that all the before-mentioned documents were in the posses-

[1] The foregoing order was discharged without costs by Lord Eldon on the 1st of August, 1825. See 4 Sim. 324. — ED.

[2] The statement of the case has been modified by the exclusion of irrelevant matter. — ED.

sion of the plaintiff or his solicitor, and that he could not put in his answer without an inspection of them.

Mr. *Barber*, for the defendant, said that the bill contained several searching interrogatories as to the dates, considerations, and other particulars of the bills of exchange; that the account was annexed by way of schedule to the bill, and the defendant was asked whether it was correct; that injustice was done to the defendant, because he was deprived of the means of showing what was the consideration for the bill of exchange on which the action was brought. Pickering *v.* Rigby;[1] The Princess of Wales *v.* Lord Liverpool.[2]

The VICE-CHANCELLOR. If the defendant wanted to prove, in the action which he has brought, the consideration given for the bill of exchange which the plaintiff now seeks to have delivered up, he ought to have filed a bill against the plaintiff for a discovery of the documents which he asks to have produced. The defendant now says that he cannot put in his answer without an inspection of those documents. He is, however, at liberty to call upon the plaintiff to produce them; and, if the plaintiff refuses, he cannot complain that the answer is insufficient. If the defendant requires them for the purposes of his defence in this suit, he ought to file a cross-bill against the plaintiff for a discovery of them.

I never understood the reasoning upon which the decision in The Princess of Wales *v.* Lord Liverpool proceeded, and I cannot accede to it. *Motion refused.*[3]

SHEPHERD *v.* MORRIS.

BEFORE LORD LANGDALE, M. R. DECEMBER 17 AND 18, 1838.

[*Reported in* 1 *Beavan*, 175.]

THE amended bill, which was for an account, alleged that the plaintiff, a Roman cement manufacturer, employed the defendant as his

[1] 18 Ves. 484. [2] 1 Swanst. 114.

[3] In Milligan *v.* Mitchell, 6 Sim. 186, 191, Shadwell, V. C., in denying a motion similar to the above, said: "It is contrary to the general tenor of the practice of this court to order a plaintiff, on the application of a defendant, to produce a document in his custody; and I do not think that I am bound to follow the decision in The Princess of Wales *v.* Lord Liverpool, except in a case precisely similar to it." Again, in Damer *v.* The Earl of Portarlington, 15 Sim. 380, 383, the same learned judge said: "Did any one ever hear, except in that very extraordinary case of The Princess of Wales *v.* Lord Liverpool (which I have always regarded as a merely political decision), of a defendant asking that the plaintiff shall produce his deeds?" — ED.

commission agent for the sale of cement, allowing him for his trouble a stipulated percentage on the amount received; that the defendant from time to time rendered accounts to the plaintiff, but which the plaintiff, relying on the integrity of the defendant, did not very accurately examine; that in December, 1837, the defendant quitted the employment of the plaintiff, but there was no settlement of accounts between them either then or at any subsequent time; and that the plaintiff had since discovered that the defendant's accounts contained many inaccurate and false entries, overcharges, &c.

"That such appear and are shown to be the facts in and by a report in writing, which hath been made to plaintiff by Robert Copeland, an accountant, upon and after an investigation of the accounts of the said defendant; and which report is now in the possession of plaintiff's solicitor, and plaintiff is willing that said defendant should inspect same, and he ought to inspect the same and explain, if he can, the several errors, omissions, and false entries in his accounts therein alluded to."

A motion was now made by the defendant for the production by the plaintiff of the report above referred to, together with other books, papers, and documents. The motion was supported by an affidavit of the defendant denying the false entries, overcharges, &c., but swearing that he was wholly unable to show that there were not any such false entries, overcharges, &c., without an inspection of said report, and the other books, papers, and documents embraced in the motion.

There was an affidavit filed on the part of the plaintiff to show the great inconvenience and difficulty, and the injury to his trade, which would result from the inspection and depositing of the documents.[1]

Mr. *Pemberton* and Mr. *Willcock*, in support of the motion.

Mr. *Kindersley*, contra.

Anon.,[2] Spragg *v.* Corner,[3] Wynne *v.* Griffith,[4] Micklethwait *v.* Moore,[5] Pickering *v.* Rigby,[6] Princess of Wales *v.* Lord Liverpool,[7] Jones *v.* Lewis,[8] Penfold *v.* Nunn,[9] were cited.

[1] The statement of the case has been modified by the exclusion of irrelevant matter. — Ed.

[2] 2 Dick. 778.

[3] 2 Cox, 109. [December 5, 1788. "It was moved on the part of the defendant that the plaintiff might leave in the hands of his clerk in court, for the inspection of the defendant, a deed stated in the bill, and referred to as being 'in plaintiff's custody, and ready to be produced as the court should direct.'

"But Lord Chancellor [Thurlow] said, that as the motion was not consented to, it was totally impossible to make the order, for it was the universal practice that if a defendant wants a discovery of any deed in the hands of the plaintiff, he must file a cross-bill for the purpose." — Ed.]

[4] 1 Sim. & Stu. 147. [5] 3 Mer. 292. [6] 18 Ves. 484.

[7] 1 Swanst. 114. [8] 2 Sim. & Stu. 242; 4 Sim. 324. [9] 5 Sim. 409.

The MASTER OF THE ROLLS, after referring to the Practical Register, p. 161, Hampden v. Hampden,[1] Pickering v. Rigby,[2] Jones v. Lewis,[3] overruled by Lord Eldon,[4] and the Attorney-General v. Brooksbank,[5] said, from the authorities I am satisfied that I cannot order the plaintiff to produce any of the documents.

The question then is, whether I have authority to make an order to enlarge the time for the defendant's putting in his answer until the accountant's report shall have been produced by the plaintiff. The original bill in the case before me seeks an account, and states errors which the defendant has made in the accounts rendered by him to the plaintiff, from time to time, whilst he was in the plaintiff's service, some of which are alleged to be wilful; all the statements in the original bill are answered in some shape or other; and then the plaintiff amends his bill, charging the defendant with having made false entries and misstatements in his accounts. [Here his Lordship read that part of the bill relative to the report in writing made by the accountant in the possession of the plaintiff's solicitor.] It is clear the defendant cannot know, without the production of the report in writing, what the alleged misstatements are. The plaintiff then charges that it is the defendant's duty to inspect the report and answer the charge; but this duty the defendant cannot comply with, unless the plaintiff will permit him to inspect the document in question. It is impossible to allow the plaintiff to say that the defendant shall not have such inspection, and at the same time permit him to call for an answer stating the result of such inspection. A question has sometimes been made, whether a plaintiff, having deposited a document in the hands of his clerk in court, can call on the defendant by the bill to inspect it there. Can he in such a case compel the defendant to go and inspect the document when it has been deposited?[6] But it is unnecessary in this case to decide that point, for the plaintiff here offers to deposit, and the defendant is willing to inspect the document when deposited. In Farnsworth v. Yeomans[7] the defendant obtained an order for further time to answer, because the document was not produced for inspection as soon as it ought to have been; in the present case the defendant is required to inspect, and the plaintiff says he may inspect, if he will pay the costs of the present motion, which the plaintiff alleges was unnecessary. If the plaintiff refuses the inspection except on terms, that amounts to a refusal, and cannot be allowed. I am of opinion,

[1] 1 Bro. P. C. 250. [2] 18 Ves. 484. [3] 2 Sim. & Stu. 242.
[4] 4 Sim. 324. [5] 1 Younge & J. 439.
[6] See the observations of Lord Eldon in Taggart v. Hewlett, 1 Mer. 499; and Auriol v. Smith, 18 Ves. 201, 204.
[7] 2 Mer. 142.

then, that the defendant is entitled to an order for one month's time to answer, after the plaintiff has deposited with his clerk in court the accountant's report, as to which document alone an order can be made.

Extract from Order.

"The court doth make no order on the motion for the production of the papers therein mentioned; but the plaintiff offering, by his amended bill, to produce for the inspection of the defendant a certain report in writing of Mr. Copeland in the pleadings named, and referred to in the said notice of motion, but not having deposited the same with his clerk in court, let the defendant have one month's time to answer the plaintiff's amended bill, from the time of being served with a notice that the said report is so deposited with the plaintiff's clerk in court, and ready for his inspection."

TAYLOR v. HEMING.

BEFORE LORD LANGDALE, M. R. JULY 22, 1841.

[*Reported in* 4 *Beavan*, 235.]

THE bill alleging some fraudulent transactions between two of the defendants, Messrs. Heming and Needham, and a Mr. Holmes, the partner of the plaintiff, set forth some letters which had passed between those parties as proving the allegation. It then contained the following passage, — that the plaintiff "hath in fact discovered various other parts of the written correspondence between the said parties, that is to say, letters from the said defendant J. S. Needham to the said George Holmes, and plaintiff is ready and willing to deposit the same, if required for the purposes of this suit, with his clerk in court, or to permit inspection thereof by the defendants hereto; but plaintiff hath, in order to avoid the expense of setting the same out in this his bill of complaint, set forth in the schedule hereto annexed, a list or schedule of such letters by date, and to which plaintiff craves if required to refer."

The schedule contained a list of about twenty letters from Needham to Holmes, specifying their dates.

The solicitor of the defendants Heming and Needham had applied to the plaintiff's solicitor for copies of the letters referred to in the preceding allegation, and he received copies of the letters which were mentioned in the schedule. Some of the dates of these copies did not agree with the dates as stated in the schedule; but this difference was stated to have accidentally arisen in the copy-

ing. It appeared from the correspondence which took place between the solicitors after the filing of the bill, that the plaintiff had in his possession other letters between Messrs. Heming and Needham and Holmes besides those mentioned in his schedule, which he refused to allow the defendants to have copies of.

Under these circumstances a motion was now made on behalf of the defendants Heming and Needham, that the plaintiff might, within seven days after service of the writ of execution of the order, deposit, upon oath, with his clerk in court the letters referred to in his bill and the schedule thereto; and also all other letters written by the said defendants or either of them to Holmes, and Holmes, Taylor, & Co., or either of them, and that the defendants might be at liberty to inspect the same and take copies thereof, and that the defendants might have a month's time to put in their answer after such letters should have been so deposited.

Mr. *Pemberton* and Mr. *W. S. Daniel*, in support of the motion.

Mr. *Rogers*, contra.

The Princess of Wales *v.* The Earl of Liverpool [1] and Shepherd *v.* Morris [2] were cited.

The MASTER OF THE ROLLS. This is an application of a description which is not very often made. Only one similar case has come before me; and I believe there are very few cases of this description to be found in the books. It is, however, a motion which is quite founded in justice, if the circumstances of the case be such as to render it proper, according to the practice of the court, to grant the application.

The plaintiff by his bill states that he has in his possession certain documents which he does not set forth, not because they are not a material part of his case, but on account of the expense, and he offers to produce or deposit them. The question which is raised on this occasion is, whether he is to exclude the defendants from that which he offers by his bill, and still avail himself of the process of the court to compel the defendants to put in their answer. I am of opinion that there is sufficient authority for saying he is not entitled to do so. If a plaintiff refers in his bill to documents in his possession as forming part of his case, then, whether he does or does not offer to produce them, he cannot call on the defendant to answer until he has seen the documents which are necessary for his answer. The court has acted on that principle from the earliest period,[3] and the case of The Princess of Wales *v.* The Earl of Liverpool was by no means the first case on the point. Judges of great experience have said that they could never

[1] 1 Swanst. 114. [2] 1 Beav. 175.

[3] See Wy. Pr. Reg. 161, and Jones *v.* Lewis, 2 Sim. & Stu. 242.

understand on what principle that case was founded,[1] but I believe it is founded on principles which upon examination would fully support it. What is asked in this case is that the plaintiff shall produce the documents. I am of opinion that I have no jurisdiction to make such an order.[2] But the next part of the application is that the defendants may have a certain time to answer after the documents have been produced. This is what the court has done before, and which it is expedient to do in cases which fall within the rule.

The plaintiff has set forth some letters, and referred to other letters, and it is contended that by his bill he leaves it to be inferred that there are letters forming part of his case which are not included in his schedule. I cannot arrive at that conclusion. I think that the defendants should have full inspection of the letters stated in the schedule before they are compelled to answer. As to those of which copies have been given, but which do not correspond as to dates with those in the schedule, I observe it stated in the correspondence that there is a mistake. This may be so. I think the defendants have a right to have this mistake explained by the affidavit of the plaintiff, or of the parties employed by him.

There has been a subsequent correspondence between the solicitors, by which it appears that there are other letters, which are not stated in the schedule, which form part of the correspondence, but not of the plaintiff's case as made by the bill. This fact appears from the subsequent letters, but not upon the record, and, however inconvenient, I am of opinion that, according to the rule of the court, I cannot either order the plaintiff to produce them, or stay the progress of the suit until they are produced. It may be inconvenient and render a cross-bill necessary, but there is not on the record a statement that the plaintiff has these documents in his possession. If a cross-bill were filed, there might be sufficient ground for a motion to stay the proceedings in the first suit until all the correspondence had been produced. I think, however, as the case stands, that the rule of the court compels me to abide by the record; and I cannot, therefore, grant that part of the application.

The order must be, that the defendants have one month's time to answer after the production of the documents mentioned in the bill, and of an affidavit to prove their identity.[3]

[1] See 5 Sim. 410.

[2] See Penfold v. Nunn, 5 Sim. 409; Milligan v. Mitchell, 6 Sim. 186.

[3] In Bate v. Bate, 7 Beav. 528, 537, Lord Langdale said: "The question is, how far the plaintiff, who refers to documents in his possession as evidence of the fact which he distinctly charges, is bound to produce that evidence before the defendant is bound to put in his answer; that I take to be the question which is raised here.

There have been several cases upon this subject; and I think they may be divided into two classes: first, cases like that of the Princess of Wales v. Lord Liverpool; and, secondly, the two several cases which came before me, and have been referred to, namely, Taylor v. Heming and Shepherd v. Morris. Those were cases in which the plaintiff by his bill not only stated that he had possession of the documents, but intending to use those documents in support of his case, he called upon the defendant to look at them, and offered to produce them for the purpose. The plaintiff, in substance and effect, stated by his bill that the defendant could not give the answer which the plaintiff desired to have for his own use, unless the defendant would look at those documents; and the plaintiff having done that, then refused to produce the documents. I think I may assume, after the investigation which this case has undergone, that there is no case whatever to be produced in which the plaintiff, charging a particular fact to be within the knowledge of the defendant, and stating, further, that he has evidence of the fact in letters which are in his possession, has been held bound to produce those documents before the defendant could be called upon to put in his answer. The strong impression upon my mind is, that there is no such case. None so contrary to the ordinary principle has been produced, and I believe that if you were to lay it down as a proposition that a plaintiff shall not proceed until the defendant knows the evidence which the plaintiff has, you would state a proposition very much at variance with the ordinary opinion of mankind as well as of lawyers. No doubt you have a right, in this court, to look at the evidence which the plaintiff states to be in his possession; but that right is only to be obtained upon a cross-bill. Every party has, in this court, that advantage which is not to be had so effectually in any other jurisdiction. He may discover that which is in the knowledge and breast of the plaintiff before he proceeds to a hearing of the cause, but he must do it in such a way as to give the plaintiff the opportunity of stating all the circumstances connected with the matter. It is undoubtedly extremely important, when the plaintiff is called upon to furnish any discovery, that he should do it in the proper form, and be at liberty to state all the circumstances relating to the matter, and that he should have all the guard and protection which he derives from being able to give a full statement of all the circumstances belonging to the case." In Turner v. Burkinshaw, 4 Giff. 399, 402, Stuart, V. C., said: "I was rather surprised at the language attributed to Lord Langdale in Taylor v. Heming, which I think cannot be taken as the law of this court. The law of the court is as stated by Lord Langdale in Bate v. Bate, and probably was so intended to have been stated by him in Taylor v. Heming." — Ed.

WALBURN v. INGILBY.

BEFORE LORD BROUGHAM, C. JUNE 20, NOVEMBER 16, AND DECEMBER 20, 1833.

[*Reported in* 1 *Mylne & Keen*, 61.]

THIS was a bill by a shareholder in an unincorporated joint stock company against the directors of the company, charging them with fraud, whereby they had profited at the expense of the company. All but four of the defendants demurred to the bill, and their demurrer was allowed; the remaining four answered, and having, by the schedule annexed to their answer, admitted that certain books and documents, which were the joint property of themselves and the other directors, and related to the matters stated in the bill, were in the custody of their solicitor, Mr. Gregson, as the agent of the directors, an order was made by the Vice-Chancellor that the plaintiff should have those papers and documents produced, and have liberty to inspect them in the usual way.

June 20.

The *Attorney-General* moved to discharge the Vice-Chancellor's order.

Sir *E. Sugden*, for the plaintiff, opposed the motion.

As the main topics of argument used on both sides were more fully urged afterwards in the application to stay execution of the order, pending an appeal to the House of Lords, it is unnecessary to repeat them here.

The Lord Chancellor refused the motion with costs.

November 16.

A motion was now made on behalf of the defendants that all proceedings to enforce production of the books and documents in question might be stayed pending an appeal which had been presented to the House of Lords against the order directing them to be produced.

The *Attorney-General* and Mr. *Wigram*, for the motion. The original order was opposed on two grounds: first, because it appeared from the defendant's answers, as well as from the bill itself,

that the property in these books and papers was a joint property, Gregson being the common agent both of the directors who demurred and of those who answered, and that the former, who had withdrawn their business from Gregson, and now employed a different solicitor, were entitled to call upon Gregson at his peril not to deliver them up or publish them to strangers. Another ground was that the discovery in such a suit could only be granted as incidental to the relief; and that here, inasmuch as several of the directors, who stood precisely in the situation of these defendants, had already on demurrer had the bill dismissed as against them for want of equity, and the order of dismissal had been submitted to without appeal, it was utterly impossible that any relief could be given at the hearing against the four directors whose names still remained on the record.

In support of the present application it is enough to show, first, that a *bona fide* and substantial appeal has been presented to the House of Lords against the order by which the production is directed; and, secondly, that the enforcement of that order would, as matters now stand, occasion serious and irreparable mischief.

Upon the first point, the affidavits show that a petition of appeal has been regularly presented to the House of Lords, and that the cause now stands in the list of appeals for hearing. To satisfy the court that this is a substantial appeal, it will be enough to refer to the arguments urged without success upon the motion in June last. How far, when of several individuals having a joint property in documents some only are before the court, an order can be made compelling the production of those documents at the instance of a stranger, without the consent and to the prejudice of such owners as are not parties to the suit, is a question certainly of nicety and novelty, and well deserving, from its importance to the parties, and for the sake of the principle, to be submitted to the judgment of the highest tribunal in the country. In the present state of the record it is impossible to conceive how relief can be given at the hearing, and as the discovery is allowed only as incidental to the relief, it would be absurd and inconsistent with principle to compel a production of documents which can never be made available in the cause.

Upon the second point, to prove that the damage is serious and irremediable, the order under appeal needs only to be stated. The instant the books are produced, the mischief is done: the whole object of the plaintiff's application is gained, and no order of the House of Lords, no security to be given or act to be done by the plaintiff, can ever by possibility restore the appellants, if they are successful, to their original situation. This, therefore, is infinitely stronger than the cases in which decrees involving the payment of sums of money have been directed to be stayed pending an appeal. There the money may be

paid back or security may be given for its repayment; but here, once permit the production and inspection of the documents, and the appeal itself becomes futile, because even success would be fruitless.

Sir *E. Sugden* opposed the application.

December 20.

The LORD CHANCELLOR. This was a motion to stay, pending an appeal to the House of Lords, the execution of an order obtained on the 20th June last, calling upon four of the defendants, Messrs. Tennyson, Russell, Lousada, and Thiselton, to produce and give to the plaintiff access to the books and papers set forth in a schedule to their answer, and admitted by them to be in the possession and custody of Mr. Gregson, who is also admitted by them to be their solicitor. It is further admitted by them that those books and papers relate to the matters in the plaintiff's bill. Thus far, then, nothing seems to be more of course than the granting the usual inspection. But it was resisted on the ground that several of the other defendants had demurred to the bill; that their demurrer had been allowed some months before the order was made, and that Mr. Gregson held the documents in question for them, as well as for the defendants who had answered, and against whom the application was made.

It is, however, to be observed that not one of the defendants who resist the production takes upon himself to swear absolutely that he has not the power of producing. What they state is as if a party were to say he could not produce papers because they were in his solicitor's hands, a statement which plainly could not protect him. The defendants' answer states that Mr. Gregson has the custody, as their solicitor, and also as the solicitor of the other defendants, and their affidavits state that the documents are in his custody, he being their solicitor in the cause, as well as the solicitor of others whose demurrer has been allowed; and that he, Gregson, objects to produce them, on account of a notice given him by two of the defendants who had demurred, and so, argumentatively and by way of inference, that under the circumstances the parties are unable to produce them. An affidavit to the like effect was also made by Mr. Gregson, admitting that he held the documents as solicitor in the cause for all the parties, as well those who continued such as those whose demurrer had been allowed. It is also sworn that some of the latter have other solicitors in their employ besides Gregson, and that through those other solicitors they have given Gregson notice, as their solicitor, not to produce the documents.

If such a defence or such an arrangement among parties having a common interest in books and papers were allowed to protect them against production, it is clear that means would never be wanting to

evade or to defeat the jurisdiction of the court. The whole affair has essentially the appearance of a contrivance for this purpose, and it can never be suffered to prevail. One party elects to demur; another thinks it for his advantage to answer; both employ one solicitor in the cause, who holds the documents relating to it for both; but the defendant who demurs, employs another solicitor, to give his solicitor in the cause notice not to produce these, and the defendant who answers says that his co-defendant, being no longer a party, has, by his private solicitor, given notice to the common solicitor not to produce the papers which are their common property, and to which both have the same title. Such an excuse cannot be admitted. The court has a right to give whatever access the party himself is entitled to, and as Gregson could not refuse access to the defendants who have answered, so cannot they refuse access to the plaintiffs. With respect to Mr. Gregson, he is quite safe in acting as the order of the court has called upon his clients to do and to permit.

It is said that no decree can ever be made in this cause; that the suit can never be prosecuted with effect against the parties who resist the application, or against any of the defendants, on account of the demurrer having been allowed. Admitting it to be so, and supposing it to be impossible that in this case the bill might be demurrable for want of equity, as against some parties, yet not as against others, still that is no reason for refusing the production. The argument that a plaintiff shall have no inspection of papers, on the ground that, even if he were permitted to inspect them, he would nevertheless fail in his suit, is not a valid one. But, strictly speaking, we are not here upon the merits of the motion granted in June. We are upon an application to stay execution of the order then made. It has, however, been frequently said by the court that these applications are in the nature of rehearings. It has also been observed, and justly, that they are not to be encouraged, because they are rehearings without the ordinary securities and checks. This, at least, may safely be stated, that unless there seems strong ground for supposing that the judgment will be reversed, and a suggestion be made of remediless mischief, the execution ought not to be suspended.

It is accordingly said here, that unless the suspension is granted, the appeal will be useless; but that is by no means correct. If the evidence is now obtained by the plaintiff under the order, and it is afterwards decided that the order ought not to have been made, the evidence will go for nothing. *Motion refused with costs.*[1]

[1] Only so much of the case has been given as relates to the question of production. — Ed.

CLARISSA MURRAY, Widow of James Murray, v. JOHN WALTER, THOMAS MASSA ALSAGER, and JOHN JOSEPH LAWSON.

Before Lord Cottenham, C. August 7, 1839.

[*Reported in Craig & Phillips*, 114.]

The plaintiff prayed, by her bill, that she might be declared to be the owner of one-half of a sixteenth share in "The Times" newspaper, which had been assigned to her husband, James Murray (whose administrator she was), on the 6th of November, 1819, by the defendant, John Walter; and that the defendants, who were also owners of shares in said newspaper, might account to her as such owner. The plaintiff stated, as a reason for not having made the other owners of the newspaper defendants to the bill, that their names had been concealed from her by the defendants, and were unknown to her.

The bill charged that correspondence had passed between the defendants, and between them and the other shareholders, relating to the matters mentioned in the bill, and from which the truth of such matters would appear, and that the defendants had in their possession books and papers relating to such matters, and by which the truth of such matters would appear.

The defendant Walter stated that he had, in the schedule to his answer, set forth a list of the several papers, writings, and documents which were in his possession, custody, or power relating to the matters mentioned in the bill, or any of them; and, save as he had in the schedule mentioned set forth, he denied that he had in his possession, custody, or power any books, papers, or documents relating, either in the whole or in part, to the matters or alleged matters mentioned in the bill, or any of them, although he believed that the treasurer of the newspaper, Mr. Delane, had in his custody the several receipts which had been given for the dividends on the profits of the newspaper, and also some books of account in which he kept accounts of his receipts and payments in respect of the newspaper, the particulars whereof, however, the defendant did not know nor could set forth as to his information and belief, save as before mentioned.

The only documents specified in the schedule were the indenture of assignment from the defendant to Murray, and certain letters written to the defendant's solicitor.

Exceptions having been taken to this answer for insufficiency, the defendant Walter afterwards put in a further answer, by which he

stated that he had caused application to be made to Mr. Delane, the treasurer, by whom the accounts of the newspaper were kept, for a list of all such receipts as had been given for the dividends upon the profits of the newspaper, and of the books of account in which Mr. Delane kept accounts of his receipts and payments in respect of the newspaper; and that, in answer to such application, he had been informed by Mr. Delane, and he believed it to be true, that Mr. Delane had now in his possession, as such treasurer, and in such manner and for such purpose as in the defendant's former answer was mentioned, the several books, receipts, and vouchers mentioned in the schedule annexed to the present answer; and the defendant denied that the same or any or either of them were or was in the possession, custody, or power of himself (the defendant) or of the other defendants to the bill or either of them, save so far as the possession of Mr. Delane might be the possession of the defendants to the bill and the other shareholders of the newspaper, which the defendant submitted to the judgment of the court. He said he believed that the plaintiff had never applied to Mr. Delane for an inspection of any of these books, receipts, or vouchers: that he believed that other account-books, receipts, and vouchers relating to the accounts of the newspaper of earlier dates than those which he had mentioned to be now in the possession of Mr. Delane, had been from time to time kept; but the defendant could not set forth the particulars of any of them or what had become of any of them, save that he had been informed and believed that they had all been destroyed as useless.

The schedule to the further answer enumerated certain books, called "publishing books," commencing on the 1st of January, 1821, and continued down to the present time; a cash-book, commencing on the 2d of January, 1837; three ledgers, the first commencing in January, 1831; a journal of credits, commencing in June, 1831; several bundles of weekly accounts; and the receipts for the dividends, from the month of December, 1833, to the 30th of June, 1838, and one banker's book, commencing in April, 1838.

The answer of the defendant Alsager stated that, to the best of his belief, the accounts of the receipts and payments of the newspaper had been kept by the treasurer, as the common agent of all the proprietors, authorized by them for that purpose; that he believed that the treasurer had now in his possession the several receipts which had been given by the proprietors for the sums from time to time paid to them in respect of their several shares of the profits, and that he had also in his possession some books of account, in which he kept accounts of his receipts and payments in respect of the newspaper, the particulars of which the defendant could not set forth.

The answer of the defendant Lawson contained a statement to the same effect as that which is above given from the answer of the defendant Alsager.[1]

The plaintiff moved, before the Vice-Chancellor, that the defendant Walter might be ordered to produce and leave with his clerk in court, for the usual purposes, the indenture of assignment, and the letters enumerated in the schedule to his first answer; and that all the defendants might be ordered to produce and leave with their clerk in court, in like manner, the several books, papers, and writings enumerated in the schedule to the further answer of the defendant Walter, and thereby stated to be in the possession of Mr. Delane; or otherwise that the plaintiff, her solicitors and agents, might be at liberty to inspect the same, at all seasonable times, at the office of "The Times" newspaper, on giving reasonable notice to the defendants, at the office; and that she might also be at liberty, at her own expense, to take copies and extracts from the said several indenture, letters, books, papers, and writings, as she might be advised; and that the defendants might be ordered to produce the indenture, letters, books, papers, and writings before the examiner, and at the hearing of the cause.

The Vice-Chancellor ordered the production of the documents mentioned in the schedule to the first answer of the defendant Walter, but refused the rest of the motion, and ordered that the plaintiff should pay the costs of the application.

The plaintiff now renewed, before the Lord Chancellor, that part of the motion which had been refused by the Vice-Chancellor; and she, at the same time, moved that the Vice-Chancellor's order, so far as it directed that she should pay the costs of the motion before his Honor, should be discharged.

Mr. *Richards* and Mr. *Romilly*, in support of the motion, commented upon the statements and admissions made by the defendant Walter in his answer and further answer, and cited Walburn *v.* Ingilby.[2]

Mr. *Knight Bruce* and Mr. *Bacon*, contra, referred to Adams *v.* Fisher.[3]

Mr. *Richards*, in reply, contended that the plaintiff, as a partner, had a right to inspect all the partnership books and papers in the possession of the common agent of the partners, and urged the extreme difficulty of bringing before the court so numerous a body as the partners in this concern, amounting in number, as they did, to thirty-six, of whom eight were out of the jurisdiction of the court. He

[1] The statement of the pleadings has been materially abbreviated. — Ed.
[2] 1 Myl. & K. 61; see pp. 78, 79. [3] 8 Myl. & C. 526.

contended that if the books and documents in question were in Mr. Walter's own possession, he could not refuse to produce them to the plaintiff; and that the possession of the common agent of himself and his copartners was equivalent to his own possession.

The LORD CHANCELLOR. In this case, the plaintiff claiming to be a partner in a concern, namely, "The Times" newspaper, up to a certain time, files a bill against the three defendants, alleging that they are partners in the concern, with others whose names the plaintiff does not know. One of the defendants, by an answer, and a second answer, says that there are certain documents which are not in his own possession, but in the possession of the treasurer of the partnership, namely, the party answering and the two defendants, who are partners, and several other partners whose names are mentioned in the answer.

The motion is against the three defendants, that they may be ordered to produce these documents.

In the first place, the two other defendants have not made any admission upon which any order at all could possibly be made.

The one defendant, upon whose answer alone any order at all could be made, states that the treasurer holds the documents on behalf of the defendant himself, of his two co-defendants, and of certain other persons whose names he mentions.

The only order which could possibly be made would be an order against that defendant who has made this admission; but to order him to produce these documents would be contrary to what I have always understood to be the practice of the court. When documents are stated in the answer to be in the possession of A., B., and C., you cannot order that A. shall produce them; and that for the best possible reason, namely, that he could not produce them.

The court would not pronounce the order for the production of the documents, unless the defendant was in a situation to justify the court in making such an order upon him. How can the court be satisfied that the defendant ought to produce the documents? He is not the proprietor. They are not in his possession, but in the possession of an agent, not of himself only, but of other persons.

It is perfectly true that, if documents are in the hands of an agent, the principle of the court is, that the possession of the defendant's agent is the possession of the defendant against whom the order is made. But here the agent is the agent not only for the defendant against whom the order is prayed but also for other defendants. The defendant against whom the order is prayed has not the possession of the documents, either personally or through an agent.

I have always understood the rule to be, that, under such circumstances, the court would not make an order for the production.

The case of Walburn v. Ingilby, as reported, no doubt seems to infringe upon that rule. All I can say is, I never considered that the practice was altered by that case. There must have been some peculiarity in that case which does not appear in the report; for an order for the production of the documents appears to have been made by the Vice-Chancellor and affirmed by the then Lord Chancellor.

I think that this appeal motion must be refused with costs.

TAYLOR v. RUNDELL.

BEFORE LORD COTTENHAM, C. JANUARY 20, 1841.

[*Reported in Craig & Phillips*, 104.]

THIS was an appeal from an order of the Vice-Chancellor, by which he had held the answer of the defendants to be insufficient.

The late Duke of York, being entitled, under a grant from the Crown, to certain mines in Nova Scotia for a long term of years, subject to a reservation of certain rents and royalties, by indenture dated the 12th of September, 1826, demised all the mines comprised in that grant to the defendants and John Bridge, since deceased, by way of underlease, reserving, in addition to the rents and royalties payable by the Duke of York to the Crown, a certain proportion of the net annual profits to arise from the working of the mines. This underlease provided, amongst other things, that the lessees should keep or cause to be kept such accounts as should be necessary to show the actual gains and profits of the mines, and should give free access and liberty to such person as the Duke of York, his executors, administrators, and assigns, should from time to time appoint, to inspect and take copies thereof; and also that they should annually, during the continuance of the term thereby granted, lay or cause to be laid before the Duke of York, his executors, administrators, or assigns, or such person as he or they should authorize to receive the same, a full, true, and particular account in writing of the number, names, and situation of the mines respectively, and also the numbers, names, and situations of all the shafts, adits, levels, drains, and other works whatsoever belonging thereto, so as to afford a full, clear, and true statement of the mines respectively, and of the several works thereof; and also that they should appoint or cause to be appointed such person as the Duke of York, his executors, administrators, or assigns, should from time to time nominate for that purpose, to have the full privileges and

powers of a director, and to sit at the board of directors appointed or to be appointed for conducting the affairs of the mining business, for the express purpose of watching over and attending to the interests of the Duke of York; such director to be first approved by the majority of the board of directors for the time being at the next meeting after such appointment.

The object of the bill, which was filed by the executors of the late Duke of York, was to obtain a discovery of the mines which had been opened and worked by virtue of the underlease, and an account of the moneys which had become due to the plaintiffs in respect of such working.

It appeared from the answer that the underlease, although in terms granted to the defendants individually, was granted to them as trustees for a numerous company, called "The General Mining Association," of which the defendants were members, and were three of the directors; and that they had never worked or been interested in any mines in Nova Scotia individually, or otherwise than as members and directors of the association.

It also appeared from the answer that a Mr. Parkinson was, shortly after the execution of the lease, nominated by the Duke of York, and duly appointed, to act as a director of the association, in pursuance of the stipulation above mentioned, and that he had ever since occupied a seat at the board in that character. It further appeared that it was, by the copartnership deed of the association, provided that the board of directors should have the entire control and management of the mines, and that a general meeting of the proprietors should be held in the month of May or June of every year, at which meeting the accounts of the association and the reports of the directors were to be produced, and that, from the fourteenth to the thirty-fifth day after the holding of every yearly general meeting, the secretary should permit any of the proprietors to have, at the office of the association in London, free access to all the accounts, books, and other documents belonging to the association, but that no proprietor should be at liberty to examine or inspect such accounts or documents, except during that period.

That portion of the interrogating part of the bill which was the subject of the first exception was as follows: —

That the defendants may answer and set forth, to the best and utmost of their knowledge, information, remembrance, and belief, whether there are not or is not in the possession of the agents or agent of the said defendants, or of one and which of them, and whether or not, more especially in America, divers and what, or some and what grants, leases, licenses, copies of grants, leases, licenses, books of

account, accounts, papers, and writings relating to the quantity of ores, coals, and other minerals which, since the 12th of September, 1826, have been gotten or disposed of from the said mines, beds, and seams, or to the sum or sums of money received since the 12th of September, 1826, in respect of making, working, getting, or disposing of the said mines, metals, minerals, ores, and other substances, or to the charges and expenses attending the same or consequent thereon, or to the gains derived therefrom, or to the grants, licenses, or leases under which any mines which, since the 12th of September, 1826, have been worked or gotten by the defendants, have been worked or gotten, and at what time the same were first opened.

The portions of the interrogating part of the bill to which the other exceptions referred sought a particular discovery of what mines had been opened and worked under the lease of September, 1826, what ores or minerals had been gotten therefrom, what moneys had been expended and received in the course of such working, and so forth.

In answer to these portions of the bill the defendants stated that they had, in the first schedule to their answer annexed, set forth a full and true list of every document in their own possession or power, and they had in the second schedule set forth, to the best of their respective knowledge and belief, a full and true list of every document in the possession of the secretary of the association in London; but they said that the secretary was not their or either of their agent, but the agent of the association, of which the defendants were shareholders and directors; and that the defendants had not nor had either of them, to their or either of their knowledge or belief, any agent in America, though they admitted that the association had agents in America; and they said that, except the documents mentioned in the first schedule, they respectively denied that there was in the possession of the agents or agent of them, the defendants, or either of them, either in America or elsewhere, any grant, lease, license, &c.

They said, however, that they believed, not from any positive information, but from the fact of there being agents of the association in America, that the principal agent had in his possession many books of account and other documents relating to the accounts of the mines, and to the working thereof; and that such agent had also in his possession some deeds and licenses relating to the title of the mines, but that, inasmuch as he was in the habit of transmitting monthly to the secretary of the association in London copies of all the accounts and other documents of interest or importance relating to the mines, the defendants believed that the documents mentioned in the second schedule would furnish all the information as to the matters of account, and, as far as they knew or believed, all information of any

importance, in reference to any of the matters in question, that could be obtained by an inspection of the documents in the possession of the agent of the association in America; and they said they were wholly unable further to set forth, as to their belief or otherwise, whether or not there was in the possession of any agent of the association in America, or, further than appeared by the second schedule, whether or not there was in the possession of any other agent of the association any grant, lease, &c.

The answer further stated that the defendants, being engaged in extensive mercantile concerns of their own, had paid but little attention to the affairs of the association, and that, save as therein set forth, they had no personal knowledge whatsoever, or other knowledge than was contained in the books and documents mentioned in the schedules, of any matters connected with the mines; that, in fact, the books and documents mentioned in the second schedule were not, nor were any of them, in the possession or power of the defendants or either of them, in any other sense than that they and the other directors of the association, including Mr. Parkinson, when assembled as a board, were competent to order the same to be used and inspected by a vote of the board: that they had no authority to make use of those documents, or any of them, as individuals, except only when sitting with the board, or by an order of the board, and except that they, in common with the other proprietors of the association, had a right to inspect the same and take copies thereof during the time limited for that purpose by the provisions of the copartnership deed: that Mr. Parkinson, as one of the directors, had the same opportunities as they (the defendants) had of inspecting and using the documents, and that they (the defendants) had not permission or authority from the board of directors to have or use them for the purposes of the present suit; on the contrary, they were informed and believed that the directors declined to allow them to use the same, or to give them any further or other information in this suit which might enable the plaintiffs to prosecute the same against them (the defendants), who were mere trustees, without bringing the other parties interested in the association before the court.

Exceptions for insufficiency having been taken to these parts of the answer, they were disallowed by the Master, but exceptions to his report were subsequently allowed by the Vice-Chancellor, who considered the answer insufficient; and the defendants now presented a petition of appeal, praying that his Honor's order might be discharged, and that the exceptions to the Master's report might be overruled.

Mr. *Wakefield*, Mr. *Bethell*, and Mr. *Wood*, in support of the appeal.

The Vice-Chancellor considered this answer insufficient by reason of its not stating that the defendants had applied to the board of directors for leave to procure and give the information required, and that such application had been refused. The defendants, however, have given to the plaintiffs by the answer all the information that they could give, without committing a breach of trust towards the other members of the association, whom the plaintiffs have not thought fit to make parties to the bill. It is clear that they could not be compelled to produce documents belonging to the partnership in the absence of any of the partners. Murray *v.* Walter.[1] The same principle was recognized by Lord Eldon in Lambert *v.* Rogers,[2] where the court refused to order a mortgagee to produce the deed of his mortgagor, though the deed related to lands of which the plaintiff and the mortgagor were tenants in common. But it has also been decided that if a party can protect himself from producing a document, he may refuse to answer any question relating to the contents of that document. In Latimer *v.* Neate,[3] your Lordship is reported to have said, "A defendant may be bound to state in his answer, and describe the documents: he may be compelled to admit that he has such documents in his possession, but not compellable to state their contents, if he is entitled to protect himself by any rule which prevents a plaintiff from asking for the production of the documents."

[The LORD CHANCELLOR. Between the case there referred to and the present there is just the difference between a privilege not to produce and an inability to produce.]

At all events, as to the list of the documents, this answer cannot be treated as insufficient, without holding that the agents of the association are the agents of the defendants individually, which they positively swear they are not.

Mr. *Knight Bruce*, Mr. *Wigram*, and Mr. *J. Russell* appeared for the respondents; but

The LORD CHANCELLOR, without hearing them, said: The whole of this argument appears to me to turn upon a supposed analogy which, in my mind, has no existence.

It is true that the rule of the court, adopted from necessity, with reference to the production of documents, is that if a defendant has a joint possession of a document with somebody else who is not before the court, the court will not order him to produce it, and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party, not present, has an interest in the document which the court cannot

[1] Cr. & Ph. 114. [2] 2 Mer. 489. [3] 4 Cl. & Fin. 570; see p. 584.

deal with. But that rule does not apply to discovery, in which the only question is, whether, as between the plaintiff and defendant, the plaintiff is entitled to an answer to the question he asks; for if he is, the defendant is bound to answer it satisfactorily, or, at least, to show the court that he has done so as far as his means of information will permit.

Now, here the plaintiffs represent the landlord; the defendants are the lessees; and by the contract between the parties, independently of their relative situation, which would be quite sufficient for the purpose, there happens to be a distinct stipulation that the accounts shall be so kept as to give the landlord all the information which he is now asking with respect to the management of the property. This being mining property, he has an interest in ascertaining what the course of proceeding is. Has he not a right to ask his lessee what documents there are to show that? From the connection between the plaintiffs and the defendants, there is no doubt the plaintiffs are entitled to an answer to that question. Then, on what grounds do the defendants refuse to answer it? That somebody else, who is not before the court, is interested in the account. This is the first time that objections for want of parties have been raised upon exceptions to an answer.

Then, if the plaintiffs are entitled to the discovery which they ask, have the defendants stated that which makes it impossible for them to give it? That is the only question which remains. The facts may be such as to make it impossible for the defendants to give the discovery; because they may, on applying for an inspection of these documents, be refused. But they have not said so: and as to the answer being full, it is made not full by the defendant's own statement. It is full in terms; but the defendants state that which they obviously state for the purpose of explaining what they mean when they say they cannot make the discovery; namely, that there are documents in the possession of the company of which the defendants are members and trustees, and also in the hands of the company's agent in America. They do not say that they ever applied for an inspection of those documents and were refused. They merely say somebody else has got the documents. Suppose a defendant should say his documents are in the hands of his own solicitor, but his solicitor refuses him access to them. The court would give him time to take such proceedings as might be necessary to compel the solicitor to give him the means of making the discovery. So, if the defendant should say, I cannot answer, because the documents are in a distant part of the world. That may be a very good reason why you should ask for time to answer, but no reason why you should not answer; and, therefore, you cannot resist exceptions for

want of an answer on any such ground. If it is in your power to give the discovery you must give it; if not, you must show that you have done your best to procure the means of giving it.

The case referred to in the House of Lords and that before Lord Eldon were cases in which the defendant insisted on a right in himself to resist discovery, and therefore to resist production. But those cases are quite distinct from the cases in which the court refuses to order a party to produce documents, not because he has a right to withhold them, but because he is not able to produce them. The distinction is very clearly marked, and shows that those cases can have no application to the present.

The counsel for the appellants having declined to argue the remaining exceptions, after this judgment on the first, the appeal, as to all the exceptions, was dismissed with costs.

MILLER v. GOW.

BEFORE SIR J. L. KNIGHT BRUCE, V. C. NOVEMBER 15, 1841.

[*Reported in* 1 *Younge & Collyer's Chancery Cases*, 56.]

THE defendant in his answer admitted that he had in his possession a copy of a letter written by him, dated May 24, 1837, and which he set forth verbatim; and he also stated the circumstances under which, and the purpose for which, the letter was written.

Upon the admission contained in the answer, the plaintiffs obtained the usual order for the production of the copy of the letter.[1]

The case coming on for hearing, the plaintiff's counsel read in evidence the copy of the letter which had been produced under the order. The defendant's counsel contended that, this document being read, all the circumstances mentioned in the answer in connection with it should be read; more especially as the clause in the answer in which the possession was admitted, and on which the order for production was founded, specifically referred to the circumstances under which the letter was written. [The VICE-CHANCELLOR. Certainly the reference is carried further than usual. There is a specific reference to specific circumstances relating to a particular document. It is a hard state of things, if the defendant is not to be allowed to explain this document, which he may never have an opportunity of explaining in any other way; and which, in fact, he has explained in his answer. But the question is, whether there is any distinction in principle between a general and specific reference.] We read no part of the answer relating to this document, except with reference to the possession of it. The defendant, therefore, is not entitled to read any passage in the answer relating to this document, except perhaps such as may qualify the possession or right of production. Taylor *v.* Salmon.[2]

The VICE-CHANCELLOR. The practice at law is clearly established, that, when an answer is used, the whole must be read. It is different in this court; but the rule here is that you cannot in reading sever

[1] The statement of the case has been materially abbreviated. — ED.

[2] 3 Myl. & Cr. 422.

parts that in substance are connected together. When, however, a document is produced from the custody of the clerk in court, under a bill for relief, the plaintiff is, I apprehend, entitled to use it without reading that part of the answer which precedes the admission of the possession of the document. I cannot conceive this rule to be likely in any case to produce practical inconvenience, because the court may look at the whole answer, if not as evidence, yet as that which may regulate its discretion with respect to the further investigation of particular facts. I shall not break through the general rule in this case, but shall admit the document in evidence, simply as coming out of the defendant's possession. The defendant, however, will be entitled to suggest for the consideration of the court, as fit subjects for inquiry at least, any circumstances affecting the document which may appear on the face of it or are stated by the answer.

BASSFORD v. BLAKESLEY.

BEFORE LORD LANGDALE, M. R. JANUARY 27, 1842.

[*Reported in* 6 *Beavan*, 181.]

THIS suit was instituted for the purpose of setting aside a series of conveyances nearly voluntary obtained by a nephew from his aged uncle.

In 1837 the plaintiff lost his only daughter, in consequence of which (as was alleged) he became overwhelmed with grief. The plaintiff at this time was nearly seventy years of age, and possessed estates of considerable value; and in April, 1838, he conveyed one of those estates to the defendant, his nephew, reserving thereout a life-estate only, and an annuity of £100 a year for any wife he might marry.

In June, 1838, the plaintiff conveyed a second estate to the defendant, reserving thereout a life-interest; and in June, 1839, he granted to the defendant a lease of the property during the plaintiff's life at an inadequate rent.

In August, 1840, the plaintiff, being on the point of marrying again, released to the defendant the annuity of £100 a year; and in December following he also conveyed to the defendant his life-estate. In these different transactions a small and merely colorable consideration purported to be given; but, in the result, the plaintiff completely denuded himself of the whole of his property, worth more than £14,000, in favor of the defendant.

The plaintiff alleged that these deeds had been obtained by fraud, deception, and undue influence, and that the defendant had procured them by practising on the fears and weakness of the plaintiff.

The defendant, by his answer, which was of considerable length, though he denied these allegations, stated that the plaintiff had long entertained a great regard for the defendant, who was his heir-apparent, and had long determined to provide for him; that the conveyances had been made by his uncle of his own free will out of regard to the defendant, and for some other consideration, with the assistance of a separate solicitor on each several occasion. The case, however, made by the defendant himself was one of great suspicion. The answer set

out the conveyances at some length, and admitted them and the title-deeds to be in the defendant's possession.

Mr. *Moore*, in support of the motion.

Mr. *G. Turner*, contra, resisted the production of the conveyances, which were the defendant's title-deeds. He argued that the mere allegation of fraud was not sufficient to entitle the plaintiff to the production; that, as the fraud had been denied by the answer, and as the deeds in question would not prove the plaintiff's case, he was not entitled to see them. He cited Tyler *v.* Drayton[1] and Kennedy *v.* Green.[2]

The MASTER OF THE ROLLS. I perfectly agree that where a bill alleges that deeds have been obtained by fraud, and the answer entirely denies the fraud and states the deeds, the plaintiff is not, in that situation of things, entitled to an order for their production.

On the other hand, it is not necessary, in order to entitle the plaintiff to the production of the deeds, that the defendant should admit that there has been fraud.

The court must look to the circumstances of each case, and, looking to the circumstances under which these deeds have been obtained, I think it is quite reasonable that the deeds should be produced. Here are conveyances from an old man under very extraordinary circumstances and almost without consideration. It is said these are the defendant's title-deeds, but, according to his own statement, he has no title except what he derived by gift from the plaintiff. I think that the plaintiff should be at liberty to see what he has done, and that the defendant should produce these deeds.

I agree with the rule stated by the defendant's counsel, that a plaintiff is not, upon a mere allegation of fraud, entitled to the production of deeds which are impeached; but here is not only the allegation of fraud, but circumstances which show me that the plaintiff is fairly entitled to have the matter inquired into.

[1] 2 Sim. & Stu. 309. [2] 6 Sim. 6.

SMITH *v.* DUKE OF BEAUFORT.

BEFORE SIR JAMES WIGRAM, V. C. MAY 24 AND 31, AND JUNE 2, 1842.

[*Reported in* 1 *Hare*, 507.]

BEFORE LORD LYNDHURST, C. JULY 16, AND NOVEMBER 10 AND 17, 1842; AND NOVEMBER 7, 1843.

[*Reported in* 1 *Phillips*, 209.]

THIS was a bill for discovery in aid of the plaintiff's defence to an action brought by the defendant for the recovery of certain tolls or dues, which he claimed as payable to him "upon and for coals gotten by the plaintiff within the defendant's manor and seigniory of Kilvey, in the county of Glamorgan, and carried through the said manor, and sold and exported to sea over Swansea Bar;" to which action the plaintiff had pleaded the general issue.

In answer to the usual charge as to documents, the defendant "admitted that he had in his custody or power, and that there were in his muniment room at Badminton, various deeds, instruments, surveys, cases for the opinion of counsel, books of account, accounts, ledgers, entries, letters, copies of and extracts from letters, vouchers, receipts, memoranda, papers, and writings, wholly or in part relating to the matters in the bill mentioned, or some of them, but he denied it to be true that thereby the truth of the matters in the bill stated and charged, or any of them, would appear or be elucidated save as by the said answer was mentioned. And the duke, in the second schedule[1] to his answer, set forth a list of all such documents. And he said that the several documents in such schedule were the title-deeds, evidences, and muniments of or belonging to him as the tenant for life as aforesaid, and the same respectively evidence or relate to his right and title as tenant for life, and of his son, the Marquis of Worcester, as tenant in tail in remainder to the said estates and hereditaments, and to the said

[1] See a copy of this schedule, *infra*, pp. 576, 577, in which the documents ordered to be produced are distinguished.

duty or payment of 4*d.* per wey, and did not in any manner evidence or relate to any estate, right, or title whatsoever of or belonging to or claimed by the plaintiff, nor were the same in any way material or necessary to or for the plaintiff's defence in the action, nor had the plaintiff any interest whatsoever in the same or any of them, and he submitted that the plaintiff was not entitled to the production thereof."

A motion was now made on behalf of the plaintiff for the production of the documents specified in the schedule.[1]

Mr. *Lloyd*, for the motion.

Mr. *L. Lowndes* and Mr. *Campbell*, for the Duke of Beaufort, opposed the motion.

The cases referred to were Smith *v.* Duke of Northumberland;[2] Bolton *v.* Corporation of Liverpool.[3]

VICE-CHANCELLOR. The subject of the action at law to which the bill refers is the claim of the Duke of Beaufort to a sum of 4*d.* for every wey of coal raised from the plaintiff's collieries and "sold and exported to sea over Swansea Bar." The duke insists that this payment has at all times been paid, and of right payable, to his predecessors; and he claims it, either as being a customary payment due to him as lord of the manor of Kilvey, or as derived from any other legal origin to which an ancient payment may be referred.

The plaintiff disputes the right thus claimed by the duke, and insists by his bill upon three matters of fact, which, if they can be established in evidence, might certainly be material to defeat the claim of the defendant.

The plaintiff alleges, first, that the 4*d.* per wey in question has been paid at different times in respect of different quantities of coal. Secondly, that the custom has been laid in legal proceedings in terms substantially differing from each other by the duke and his predecessors, or those who have represented the interest which the duke now possesses. Thirdly, that in the consideration for the payment of 4*d.*, the duke's predecessors, or those who have represented the like interest, have included, by way of easement, ways and places to lay down coal by the water side; but such easement has in fact been from time to time the subject of specific contract between the owners of the coal and the duke's predecessors.

The bill seeks discovery as to these three several allegations, and contains the general charge of the possession of documents relating to the matters mentioned in the bill. To this charge the answer is — [His

[1] The original report contains a full statement of the pleadings; but it is believed that the foregoing is all that is necessary to render the case intelligible. — ED.

[2] 1 Cox, 868. [3] 8 Sim. 467; s. c. 1 Myl. & K. 88.

Honor read the answer to the charge of the possession of documents].[1]

Now, upon this answer I observe that, according to my apprehension of the practice of the court, an admission, in general terms, that the documents in the schedule are relevant to the plaintiff's case, throws upon the defendant who makes that admission the *onus* of excusing himself from producing the documents in the schedule. The answer in this case admits that the documents in the schedule are relevant to the plaintiff's case, and that admission taken alone will *prima facie* entitle the plaintiff to inspect them: Storey *v.* Lord George Lennox;[2] Tyler *v.* Drayton;[3] Neesom *v.* Clarkson;[4] and it is abundantly clear that, where documents in the defendant's possession are admitted to be relevant to the plaintiff's case, the plaintiff, and not the defendant, has a right to judge for himself of the materiality of such relevant documents; and that a suggestion in the answer, that the relevant documents will not prove the plaintiff's case, is not alone an answer to a motion for their production.

Then has the duke suggested any sufficient reason why he should not be ordered to produce for the plaintiff's inspection those documents relevant to the matters mentioned in the bill which he admits are in his possession?

The suggestions, and the only material suggestions, in the answer are, first, that the documents in the schedule are evidence, or relate to the right and title of the duke and his son, Lord Worcester, and the duty or payment of 4*d.* per wey; and, secondly, that they do not in any manner evidence or relate to any estate, right, or title whatsoever of or belonging to or claimed by the plaintiff. Now, the first branch of these suggestions is clearly insufficient; for, consistently with it, the documents may relate to the plaintiff's case, and prove that case as well as the defendant's; and it is only where documents are exclusively relevant to the defendant's case that the defendant has a right to withhold them. There is no suggestion of such exclusive relevancy here. On the contrary, they relate to the 4*d.* per wey, and the variance in the payment is admitted and explained. Burrell *v.* Nicholson;[5] Bolton *v.* Corporation of Liverpool;[6] Attorney-General *v.* Lambe;[7] Combe *v.* Corporation of London.[8] The second, as it stands upon the answer, is as clearly insufficient. The plaintiff, by his bill, has made three specific points, which I have already noticed. No one of these points, nor the conclusion to which they lead, can, with any approach

[1] *Supra*, pp. 571–572.
[2] 1 Myl. & Cr. 525; s. c. 1 Keen, 341.
[3] 2 Sim. & Stu. 309.
[4] C. P. Cooper, Select Cases, p. 98.
[5] 1 Myl. & K. 680.
[6] Id. 88; s. c. 3 Sim. 467.
[7] 8 Y. & Coll. 168.
[8] 1 Y. & Coll. Chan. Cas. 631.

to accuracy of language, be described as an "estate, right, or title of or belonging to or claimed by" the plaintiff. The answer, denying only that the documents relate to "any estate, right, or title of or belonging to or claimed by the plaintiff," may be studiously evasive. The fact is, that the plaintiff has no case to establish, except a negative of the defendant's claim; and the three points he makes by his bill constitute a case, by way of evidence only, leading to that negative. The plaintiff, then, has a right to all such discovery as will enable him to prove that case; and, consistently with the answer, the documents may do that. This is obviously the spirit and meaning of the judgment in the case of Bolton *v.* Corporation of Liverpool, although the language of the court in that case, being addressed to the particular facts of that case itself, may not in terms meet the case now before me. And it is not correct to say that, if I ordered the duke to produce the documents, to the production of which he objects, I should act against Bolton *v.* Corporation of Liverpool.

First, consider the case with reference to the alleged variance in the quantity of coal contained in the wey, in respect of which the 4*d.* has been paid.

In Bolton *v.* The Corporation of Liverpool, the bill alleged generally that if the corporation would produce their own documents relating exclusively to their own title, it would thereby appear that their case at law was unfounded; that is, that the production of the documents of the corporation would furnish evidence against themselves. The defendants denied this allegation, and the court decided, and, I think, properly decided, that where a defendant credibly denies the allegation upon which the plaintiff founds his title to a production of documents, relating exclusively to the defendant's case, the plaintiff has no right to call for an inspection of such documents only for the purpose of seeing whether he can by such inspection discover something which may invalidate the defendant's case.

That, however, is not the case here. The bill in this case alleges facts, as being within the knowledge of the defendant, which, if true, will be material evidence for the plaintiff in answer to the defendant's case. Those facts may for the purposes of the present discussion be assimilated to a replication (though not strictly such) to the defendant's case. They are strictly the plaintiff's case. The *onus* of proving that case lies upon the plaintiff, and discovery from the defendant is evidence to which the rules of equity entitle him.

It was said, in argument, on behalf of the defendant, that, if the plaintiff had no right to inspect the documents in a case like Bolton *v.* The Corporation of Liverpool, he cannot be in a better position only because he alleges a specific defect in the defendant's case, and makes

that specific defect his own case. With this observation I am disposed to agree, provided the plaintiff is unable to carry his case beyond his own allegation, and that allegation is denied by the answer. In this, as in every case, the question, whether the defendant shall be compelled to produce the documents in his possession for the plaintiff's inspection, must depend upon the answer. The reasoning of Lord Cottenham, in the case of Adams *v.* Fisher,[1] and in Storey *v.* Lord George Lennox, will clearly warrant this conclusion, whether that reasoning was correctly applied in Adams *v.* Fisher or not. And if, in the case before me, the duke had alleged with due precision that no such variance in the payments per wey, as the bill specifically charges, appeared in any of the documents in the schedule, I might possibly have decided that the documents ought not to be produced. I see no other way of avoiding the conclusion adverted to in the argument, that a plaintiff, by alleging that which is untrue, might otherwise entitle himself to the production of documents to which, according to the truth of the case, he was not entitled. It is obvious that a plea (if a plea could be framed to meet the bill) would not in that respect place the defendant in a different situation from an answer; for the discovery asked would be directed against the truth of the plea. And if the defendant was not allowed by answer to protect himself against discovery improperly called for, he would be wholly without the means of defence, which is absurd. I notice this in order that it may not be supposed that my judgment in this case proceeds upon the ground that the duke might not by proper or sufficient averments have protected himself by answer against the production of documents which, according to the truth of the case, the plaintiff had no right to inspect. But that is not the question here. The duke does not deny the alleged variance in the payments for the coal, but admits and explains the fact. The documents showing this variance are, therefore, evidence of a case the plaintiff has made by his bill. The body of the duke's answer containing that admission might be read against him at law; and there is no principle upon which I can refuse a production of the documents, which (as Lord Eldon often said[2]), being in the schedule, and being also evidence of the plaintiff's case, are in the same situation as if they were set out *in hæc verba* in the answer. If the case of Bolton *v.* The Corporation of Liverpool, as reported by Mr. Simons,[3] is carefully examined with reference to the documents which the Vice-Chancellor ordered to be produced, that case will be found, to a great extent, an authority for the opinion I now express.

[1] 3 Myl. & Cr. 526.

[2] Wright *v.* Akyns, 14 Ves. 213; Evans *v.* Richards, 1 Swanst. 7.

[3] 3 Sim. 467.

It is satisfactory to me to reflect that the case of the defendant cannot be injuriously affected at law by the opinion I have formed; for although, in a cause seeking relief in equity, the plaintiff may perhaps be entitled to read documents obtained from the defendant's answer, apart from the body of the answer (Miller *v.* Gow [1]) at law, he can only read them as part of his answer, and will thereby have the benefit of the explanation he has there given. Miller *v.* Gow; Brown *v.* Thornton.

The observations which I have made upon the alleged variance in the quantity of coal, in respect of which the 4*d.* has been paid, apply, in some respects, to the other two points made by the plaintiff. In each of the latter cases, the duke, to some extent, admits the truth of the plaintiff's allegation, though not with the same distinctness as in the first case.

My judgment upon the whole case proceeds upon this, — that the admission of relevancy *prima facie* entitles the plaintiff to inspect the documents, and that the protection which the duke claims is not claimed in terms sufficiently definite and precise to entitle him to that protection.

The defendant may yet, if he pleases, show by affidavit that particular documents ought not to be produced.

The right of the plaintiff to the production of the documents in the schedule, according to the principle referred to in the above judgment, was considered in the presence of counsel on both sides. The result appears in the following copy of the schedule, in which only the arrangement is altered: —

Ordered to be produced.	*Not ordered to be produced.*
The Earl of Worcester's Audit Rolls; 33 H. 8; 3 Edw. 6; 5 Edw. 6; 1 Ph. & M.; 5 & 6 Ph. & M.; 1 to 42 Eliz.; 1 to 17 J. 1; 2 to 17 C. 1. *Note.* — Most of the above audit rolls contain an entry or entries of receipts of moneys on account or in respect of the payment of 4*d.* per wey in question, and in the others the account is returned in blank. 1702 to 1743. — A series of rentals of the successive Dukes of Beaufort for each year, each containing entries of receipts of sums of money in respect of the payment of 4*d.* per wey in question. 1734 to 1831. — A bundle of original accounts, very many in number, delivered by or on behalf of the Honorable Bussey Mansel, from 1734 to 1741; Bussey, Lord Mansel, 1742 to	24 Feb. 1305; 34 Edw. 1. — Copy translation of the charter of William de Breons to the town of Swansea. 2 Edw. 3. — Office copy charter of confirmation to John de Mowbray and Oliva, his wife, of all the land in Gower, with the appurtenances in Wales. 5 J. 1. — Office copy grant to Edward, Earl of Worcester, of certain liberties. 29 C. 2. — Exemplification of the grant of 5 J. 1. 23 Feb. 1702. — A case submitted by the Duke of Beaufort as to his right of action against the then tenant and late lessee of the said payment of 4*d.* per wey for rent accruing after the expiration of his lease, and the opinion of Mr. Dobyns thereon.

[1] 1 Y. & Coll. Chan. Cas. 56.

[2] 1 Myl. & Cr. 248.

Ordered to be produced (continued).

1750; C. Townsend, 1751 to 1769; J. Townsend, 1769 to 1772; J. C. and H. Smith, 1778 to 1818; plaintiff, 1829 to 1831.

8 Mar. 1741; 29 May, 1755. — Letters from Gabriel Powell, steward of the Duke of Beaufort, to his Grace.

30 June, 1755. — Letter from C. Townsend to the Duke of Beaufort, and a copy indorsed thereon of his Grace's reply, dated 9 July, 1755.

10 June, 1755. — Letter from Gabriel Powell to the Duke of Beaufort.

14 July, 1755. — Letter from C. Townsend to the Duke of Beaufort.

29 Sept. 1755. — Letter from C. Townsend to Gabriel Powell.

5 and 26 October, 1755; 5 June, 1756; 5 July, 1756. — Letters from Gabriel Powell to the Duke of Beaufort.

20 Eliz. 1583. — A mutilated copy of a survey of the manor of Kilvey.

27 Aug. 1650. — Survey of the seigniory of Gower and the several members thereof, begun the 27th of August, 1650, by Bussey Mansel and John Pirie, Esqs., and George Billinghurst, gentleman, by virtue of a commission from Oliver Cromwell.

27 Sept. 1686, 2 J. 2. — An original survey of the manor of Kilvey, by a jury of survey, being tenants of the manor, under a commission of survey from the then Duke of Beaufort, lord of the manor, and which survey is signed among other parties, tenants of the manor, by T. Popkin and R. Morgan.

1764. — Survey of the seigniories of Gower and Kilvey, made by G. Powell, Esquire, steward thereof, by command of Elizabeth, Duchess Dowager of Beaufort.

8 Dec. 1750; 22 Feb. 1788. — Counterpart of lease from Charles Noel, Duke of Beaufort, to C. Townsend, referred to in the complainant's bill.

Not ordered to be produced (continued).

2 Feb. 15 C. 2, 1664. — Original and counterpart indenture of lease from R. Raworth and R. Cox, Esquires, of the first part; Edward, Earl and Marquis of Worcester, and Henry, Lord Herbert, his son and heir-apparent, of the second part; and T. Williams, of Swansea, merchant, of the third part, being a demise of the said 4*d.* per wey of coals, wrought within the manors of Kilvey, and thence exported over the bar of Swansea, to hold for twenty-one years at a yearly rent of £12 and one couple of fat capons.

20 July, 27 C. 2, 1675. — Counterpart indenture of lease from Henry, Marquis of Worcester, of the one part, and D. Evans, of the other part, being a demise of the said 4*d.* per wey, due and payable for every wey of coals wrought within the lordship of Kilvey, and from thence exported over the bar of Swansea, to hold for twenty-one years at the yearly rent of £12 and two fat capons.

2 Nov. 1748. — Indenture between Henry, Duke of Beaufort, of the one part, and the Hon. Bussey Mansel, of the other part.

22 Feb. 1783. — Counterpart of lease between Henry, Duke of Beaufort, of the one part, and Lord Vernon, of the other part, referred to in the complainant's bill.

18 and 19 May, 1810. — Original lease from C. H. Smith, of the one part, and Henry Charles, Duke of Beaufort, of the other part.

1 Mar. 1827. — Counterpart indenture of lease between Henry Charles, Duke of Beaufort, and the present duke (then Marquis of Worcester), of the one part, and G. Tennant, Esquire, of the other part.

Cases and opinions of counsel thereon, being all of them subsequent in date to the refusal of the complainant to pay the 4*d.* per wey in question, and with a view to proceedings taken or to be taken against the complainant for recovering the said payment.

No application was made for liberty to seal up such parts of the above documents as did not relate to the matters mentioned in the bill. Nor did the defendant avail himself of the offer made by the court to show by affidavit that any particular documents ought not to be produced.

A motion was made before the Lord Chancellor to discharge or vary the foregoing order.

Mr. *Lowndes* and Mr. *Campbell*, in support of the appeal motion.

The order now appealed from is the first instance in which a plaintiff, not relying on an affirmative title in himself, but merely suggesting a defect in the title of his adversary, has been held entitled to the production of documents which the latter insists are the evidences and muniments of his own title. In Bolton *v.* The Corporation of Liverpool,[1] Lord Brougham adverts pointedly to the distinction between these two cases, and says: "A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his own title, defeat it by entitling his adversary." It was said, however, in the court below, that the doctrine there laid down did not apply to a case in which the bill suggested specific defects in the defendant's title, and charged that the documents, if produced, would disclose them; in that respect, however, the case of Bolton *v.* The Corporation of Liverpool is exactly similar to the present, for, on reference to the pleadings in that case, it appears that the bill did suggest that the dues in question had varied both in amount and in the description of goods on which they had been levied. And the answer, moreover, contained no such denial as there is here, that the documents were material to the plaintiff's defence in the action. The statement was simply that they were the title-deeds of the corporation, and on that ground the production was refused. In the present case the defendant relies on the immemoriality of the payment; he says he is prepared to make good his claim at the trial, by proving that the 4*d.* per wey has been uniformly rendered for so long a period that a court of law will presume it had a legal origin, and the affirmative of the issue is with him. The plaintiff's case is simply that the defendant will not be able to sustain the issue; that the documents in question, so far from proving, will disprove it; but is that any reason why the defendant should be obliged to produce these documents before the trial, to enable his adversary to find flaws in them, perhaps other flaws besides those which he has suggested?

It is said, indeed, that the answer admits that the payments have, for

[1] 1 Myl. & K. 88.

a certain period, not been uniform; but even if that were true, it could only entitle the plaintiff to the production of the documents relating to that period, and would furnish no ground for a sweeping order to produce all the audit rolls and rentals from the time of Henry VIII. downwards. In fact, however, the answer contains no such admission; on the contrary, it satisfactorily accounts for the variation on the ground of mistake, by showing that it was afterwards rectified; so that substantially it admits no variation at all. If that be the effect of the answer, the present case is, as to this class of documents, on all-fours with Bolton *v.* The Corporation of Liverpool and Combe *v.* The City of London,[1] in the latter of which cases Lord Abinger, C. B., thus states his ground for refusing the production of certain documents on which some of the defendants relied as evidence of the usage under which they claimed. "It is asking the defendants in equity to lay their case before the plaintiffs in equity, that they may find out an objection. The constancy of the usage may be a very material ingredient in support of it, and their books must prove the case one way or the other; it is clear, therefore, that the plaintiffs have no right to see the books, to ascertain whether the defendants have charged more or less at different times. That is asking for a discovery of the weakness of their adversary's title, and not of the strength of their own."

[The LORD CHANCELLOR. In Combe *v.* The City of London, was there any thing more than a general charge of variation? there must be a specific averment; but if there is a specific averment, and you admit it, and do not deny that documents which you admit to be in your possession will show it, surely you must produce the documents.]

In Combe *v.* The City of London there were specific charges of variation, as well as in Bolton *v.* The Corporation of Liverpool.

With respect to the other charge of variation, that the custom has been laid in different terms at different times, if the survey of September, 1688, be supposed to furnish any evidence in support of it, we are willing, and indeed offered in the court below, to produce that document; but we submit that there is no such admission, in the answer to the general charge of variation on this point, as to warrant an order for the production of the other surveys.

Mr. *Lloyd*, contra, relied on Tyler *v.* Drayton,[2] Kennedy *v.* Green,[3] Burrell *v.* Nicholson,[4] Storey *v.* Lord George Lennox,[5] and contended that the observations attributed to Lord Abinger in the passage cited from his judgment in the case of Combe *v.* The City of London could not be reconciled with the established doctrine of this court.

[1] 4 Y. & Coll. 189; see p. 159. [2] 2 Sim. & Stu. 309. [3] 6 Sim. 6.
[4] 1 Myl. & K. 630. [5] 1 Myl. & Cr. 525.

Mr. *Lowndes*, in reply. None of the cases cited is an authority for saying that a party, not alleging an affirmative title in himself, can entitle himself to the production of his adversary's muniments of title, by merely suggesting a specific defect in that title; and still less where the suggestion is either denied, or, which is tantamount to a denial, satisfactorily explained away by the answer. The case of Burrell *v.* Nicholson, which is the only one of those cited that even appears to give any countenance to such a doctrine, is in reality no authority for it; for the question at issue was one of boundary, and each party had to maintain an affirmative proposition, — the one, that the boundary line ran in one direction, the other, that it ran in another, — so that the plaintiff's case did not consist, as it does here, in a mere negation of the defendant's title.

If this order is to stand as to the audit rolls and rentals, the consequence will be that there will hardly be any case in which a party, whose only reliance is on the weakness of his adversary's title, will not be enabled, by means of a bill of discovery, to ransack that adversary's evidence before the trial; for he will only have to suggest one or two imaginary defects in the chain of it, and if there be the slightest color for the suggestion, however satisfactorily it may be explained away, the documents containing that evidence will have to be produced.

The Lord Chancellor. The question in this case is, whether the defendant is bound to produce certain documents in his possession that tend to prove that the alleged custom or ancient payment and claim to the dues demanded by him has varied at different periods as to the quantity of toll, and in other respects, and thereby to impeach its legal existence and validity.

The plaintiff states in the bill the variations on which he relies, and charges that the defendant has in his possession certain documents relating to the said matters, whereby the truth thereof will appear, and prays that he may set forth a list of them. The defendant admits in his answer that he has in his possession various documents wholly or in part relating to the matters aforesaid, but denies that thereby the truth of such matters, or any of them, will appear, save as by the said answer is mentioned. He sets forth in a schedule a list of documents.

The defendant having thus admitted that he has in his possession documents which relate to the matters in the bill mentioned, that is, to the variations so stated and set forth by the plaintiff, he is bound according to the general rule to produce them; and it is not a sufficient answer to say they will not establish the truth of the matters charged by the plaintiff; still less can it be so when the answer is qualified with the reservation, "save as in the answer mentioned." The plaintiff has a right to see the documents and to judge for himself.

But it is further stated by the defendant "that these documents are his title-deeds, evidences, and muniments, and that they evidence or relate to his right and title to his estates and to the said duty or payment, and do not in any manner evidence or relate to any estate or right belonging to or claimed by the plaintiff, nor has the plaintiff any interest in them."

With respect to the latter part of this statement, it is sufficient to observe that the plaintiff does not claim the inspection of these documents as evidencing or relating to any estate or right belonging to him; nor does he claim any interest in them in the sense in which the word is here used; he admits them to be the property of, and to belong to, the defendant. This is not the ground on which he rests his right to inspect them. He claims the inspection of them as relating to the matters charged by him in the bill, — to the variations there stated to have taken place at different periods in the alleged custom, ancient payment, or claim of toll. This is the ground of his claim. And with respect to the former part of the allegation, in which it is stated that these documents are the title-deeds, evidences, and muniments of the defendant, and that they evidence or relate to his right and title to the said duty or payment, the answer is, that the plaintiff does not require the production of those documents that exclusively evidence the title of the defendant to the dues in question; he requires the production of those which come under the second branch of the alternative, those which relate to the right and title of the defendant, and which, while they relate to the right and title of the defendant, relate also to the variations, that is, to the matters charged in the bill, and which the plaintiff has an interest in establishing. It is obvious that these must be included among the documents which relate to the right of the plaintiff. These are what the plaintiff requires; they do not exclusively evidence the defendant's title; they show the alleged variations, and thereby tend to disprove it. To these, I think, he is entitled.

The decision in Bolton *v.* The Corporation of Liverpool was much relied upon in the argument, both in this court and before the Vice-Chancellor. But the principle upon which that decision proceeded is not, I think, at all at variance with the judgment in this case. The allegation in the answer there was, that the grants, deeds, and documents were the title-deeds and documents evidencing and showing the title of the corporation to the town dues and customs aforesaid. They were stated to be the proofs of the title of the defendants. It was observed by the Lord Chancellor that the plaintiff did not claim any thing affirmatively under the documents. "A party cannot call for the production of documents, which, instead of supporting his title, defeat it by entitling his adversary. The description of the documents is that

they rebut or negative the plaintiff's title. The plaintiff cannot call for these documents merely because they may, upon inspection, be found not to prove his liability." And when the case was before the Vice-Chancellor,[1] that learned judge said: "Inasmuch as these documents are described as being documents which evidence the title of the defendants, and as nothing is to be inferred from any passage in the answer that they evidence the title of the plaintiffs, which they might do, though they evidence the title of the defendants, I am of opinion that the inspection ought not to be granted." It is clear, therefore, that in both courts that judgment proceeded on this principle, that the documents, the production of which was required, exclusively evidenced the title of the defendants. But in the present case, though the documents relate to the defendant's title, they also relate to the matters specifically charged in the bill as constituting the plaintiff's defence; and this is admitted by the answer.

The principle, therefore, on which that decision proceeded is not at variance with the judgment of the Vice-Chancellor in this case, but appears to me to be in accordance with it; I think, therefore, the appeal must be dismissed.

[1] 8 Sim. 467; see p. 490.

BENNETT v. GLOSSOP.

BEFORE SIR JAMES WIGRAM, V. C. JULY 3, 1844.

[*Reported in* 8 *Hare*, 578.]

THE plaintiff claimed to be entitled to certain real estates as the heir-at-law of Mary Shepherd, who was the heiress-at-law of John Carrington the younger, who was the heir-at-law of John Carrington the elder; and the bill was for discovery, in aid of an action of ejectment which the plaintiff alleged that he was about to commence against the defendants, who, under the will of Mary Shepherd, were devisees of the estates in question, in trust for sale; but which devise the plaintiff alleged was invalid, either because Mary Shepherd had no power to appoint or devise the estates, or, if she had, that such devise was not a due exercise of that power.

The answer stated that certain lands therein mentioned had descended from Carrington the elder to Carrington the younger, and from Carrington the younger to Mary Shepherd: that, by an indenture, dated in September, 1804, George Shepherd and the said Mary his wife covenanted to levy a fine *sur conuzance de droit come ceo*, &c., of the hereditaments which had so descended to her, and that it was thereby declared that such fine should inure to such uses as George Shepherd should by deed or will appoint: that a fine with proclamations was accordingly levied, and subsequently several parts of the property were sold and conveyed by George Shepherd: that, by indenture of lease and release, dated in September, 1836, George Shepherd limited and appointed certain of the said hereditaments unto the defendants, their heirs and assigns, upon trust to stand seised thereof to such uses and for such purposes as the said Mary Shepherd should by deed or will appoint; and, in default of such appointment, to the use of Mary Shepherd, her heirs and assigns, for ever: that, in February, 1837, Mary Shepherd appointed and devised the said hereditaments to the defendants: that in 1842 she died, and that the plaintiff was her heir-at-law.

The plaintiff moved for the production of the documents, and especially the indentures of September, 1804, and September, 1836.

Mr. *Bird*, for the motion, submitted that the plaintiff was entitled to the production of the deeds of 1804 and 1836. They were deeds under which, according to the defendants' admission, the plaintiff

would take as heir-at-law of Mary Shepherd, in default of appointment: they therefore formed part of the common title of the plaintiff and the defendants. Both parties claimed to derive title under those deeds. In the instruments prior to the will of Mary Shepherd, and by which the estate was vested in her and her heirs or appointees, both parties were equally interested, at least for the purpose of the trial; and the plaintiff was entitled to inspect them. Collins *v.* Gresley.[1] The deeds of 1804 and 1836, moreover, formed a necessary part of the evidence of the plaintiff in the ejectment, as showing the seisin of the ancestor under whom he claimed.

Mr. *Elmsley*, for the defendants, was not heard.

The VICE-CHANCELLOR. According to the case made by the bill and answer, there appears to be no issue raised on the fact of the seisin of Mary Shepherd. The issue turns on the validity of the devise by her will. I do not say that — if it appeared that the heir-at-law would be unable to make out his title in ejectment, without the aid of an instrument under which the defendant also claimed, by reason that the freehold was in a married woman at the time of her death, or for any other reason — he might not be entitled to a discovery of that instrument. But no case of that kind is made upon the pleadings. The deeds, a production of which is asked, are, upon these pleadings, the evidences of the defendants' case only. According to the case upon the pleadings, the plaintiff wants discovery only to prove his heirship in the ejectment, and the *onus* will then be thrown upon the defendant to prove the case he makes by his answer.

It has been argued that the plaintiff is entitled to the production of the deeds anterior to the will, as being a part of the common title of both parties. But this might always be urged with as much reason as in the present case by every heir-at-law who is ousted by a devisee or an alleged devisee. Down to the will, the title-deeds of the devisor commonly tend to establish his title; and therefore, if the devise be set aside, they must tend to establish the title of the heir-at-law of the devisor. But that has never been held, in this court, to be a ground to entitle the heir-at-law to a production of all the title-deeds relating to the estate he claims, until he has made out that his heirship gives him an interest in the estate. The question upon this motion is, what documents may assist the heir in proving his heirship. If the case of Collins *v.* Gresley, which has been cited, be considered as deciding that, where parties claim adversely, but under a common title to a certain point, either of the parties is entitled to inspect the deeds in the possession of the other, of a date prior to the time at which they become hostile, it certainly is not in accordance with the practice in this court. *Motion refused.*

[1] 2 Y. & J. 491.

THE MARQUIS OF BUTE *v.* THE GLAMORGANSHIRE CANAL COMPANY.

BEFORE LORD LYNDHURST, C. 1845.

[*Reported in* 1 *Phillips*, 681.]

THIS was a renewal, before the Lord Chancellor, of a motion which had been refused by the Vice-Chancellor of England for the production of the documents mentioned in the schedule to the answer.

Mr. *Stuart* and Mr. *James*, for the motion.

Mr. *Bethell* and Mr. *Colvile*, contra.

The material parts of the pleadings, and the points taken in the argument, are fully stated in the judgment.

The LORD CHANCELLOR. The bill states that a narrow strip of land, containing seventeen acres more or less, part of a larger piece, was purchased by the defendants under the authority of an act of Parliament in the year 1803 from the then owners under whom the plaintiff claims title; that, upon the land so conveyed, the canal, towing-paths, and other works were or had been formed; that this strip of land was divided from the remaining portion by a ditch, which ran the whole length of it, and formed the boundary between the two properties. It then stated that, by different modes described in the bill, the defendants had gradually encroached upon the plaintiff's land, filling up the ditch, or the greater part of it, and obliterating the boundary; that quays and wharves had been built along the canal upon land obtained for the purpose from the plaintiff, and that the defendants had received payments and acknowledgments by the parties occupying the quays and wharves, which payments, though made in the first instance in respect merely of frontage, or of some benefit or accommodation received from the company, had in process of time been claimed and received as rent for a portion of the land covered by the quays and wharves; that these occupiers were fifty in number, and that it would be impracticable to proceed at law for the purpose of defining the boundaries or recovering the possession. The bill then, anticipating the defence of the Statute of Limitations, charged that the various

acts of encroachment before mentioned had been going on gradually and continually until a very recent period; that the defendants now claimed to be entitled to twenty-four acres, being seven acres more than the original grant, and had put down boundary stones to mark the extent of their claim; the plaintiff therefore prayed, among other things, for a commission to ascertain and settle the boundaries.

The defendants in their answer denied the particular acts of encroachment with which they were charged by the bill and stated that the filling up of the ditch, which they admitted to have been the original boundary, was not their doing, but the result, in part, of acts of the plaintiff's own agents, but chiefly of the occupiers of the quays and wharves, who (they said) had commenced the buildings upon the land of the defendants before they applied for additional land to the plaintiff, and had then filled up the ditch for the purpose of uniting the two; that those parties were their tenants, and that the payments were made in respect of the rent due from them as such tenants. The defendants admitted that the number of acres which they now claimed was greater than that specified in their conveyance from the plaintiff's ancestor; but they insisted that, if there had been any encroachment, they had been in undisturbed possession of what they now claim for more than twenty years, and they relied upon the statute.

The plaintiff in his bill charged that the defendants were in possession of several maps, surveys, and other documents relating to the matters mentioned in the bill, and from which, if produced, the truth of such several matters would appear. The defendants admitted in their answer that they had in their possession divers maps, surveys, and other documents relating to the matters aforesaid, and set out a list of them in a schedule; they also set out in another schedule a list of the leases which they had from time to time granted to the occupiers of the quays and wharves, but added that they formed part of the evidence of the title of the defendants, and did not form part of the title of the plaintiff to the premises comprised therein.

The usual motion was made before the Vice-Chancellor of England for the production of the documents in question. This motion was refused with costs; the grounds of the refusal are not stated in the copy of the judgment which has been handed to me. It merely mentions that the learned judge had read the bill and answer, and that he was of opinion that there was no case for the production.

The plaintiff has moved to discharge that order. The question is, whether, having regard to the statements on the record, the plaintiff is entitled to the production.

It is objected that this is a dispute between two contiguous proprietors as to their actual boundaries, that the remedy is at law, and

that there is no ground for equitable interference. The rule, as I apprehend, is this, that the mere confusion of boundaries between adjacent proprietors will not support a bill for a commission; there must be some equity arising out of the conduct or acts of the party against whom the commission is prayed, or the bill must be brought for the purpose of preventing a multiplicity of suits. In the case of Wake *v.* Conyers,[1] referred to by the defendants, it is stated by the Lord Keeper (Northington) that the court will entertain such a bill "where there might have been a multiplicity of suits, or where the confusion has been created by the act of the parties, as where a party has ploughed too near another, or the like." I think the allegations in this bill present a case which, if substantiated by evidence, would entitle the plaintiff to a commission; the bill states a system of gradual encroachment on the part of the defendants, the filling up of the ditch, and obliterating the boundaries; and, further, the necessity, if this court should not interfere, of bringing a great number of actions against different parties in order to fix the boundaries and establish the plaintiff's right.

I cannot, therefore, refuse the production on the ground taken at the bar, that no case for a commission has been made by the bill. If that indeed were so, the defendants might have demurred, and protected themselves from the discovery. But they have not thought proper to pursue that course; and, the possession of documents relating to the plaintiff's case being admitted, they are bound to produce them, unless they can show some special reason to excuse it. As to the greater part, no reason is assigned why they should not be produced, except that they are their private books and relate to their general business, — that they are in frequent use and cannot be removed; with respect to these the court will do what is usual in such cases, — order that they should be inspected at the office of the defendants at convenient times, and that such parts as do not relate to the matters in question in the cause may be sealed up on the usual affidavit. With respect to the leases, it is stated in the answer that they form part of the evidence of the title of the defendants, and do not form part of the title of the plaintiff to the premises in question. I think this is not sufficient; they are not asked for as evidence of the plaintiff's title in the ordinary sense of the word, but as evidence of the allegations in the bill to entitle the plaintiff to a commission. I do not, therefore, think this averment in the answer sufficient to excuse the production. The case in this respect is not unlike that of The Duke of Beaufort *v.* Smith,[1] decided first by the Vice-Chancellor Wigram, and which afterwards came before me upon appeal.

[1] 1 Eden, 331. [2] 1 Hare, 507; 1 Phillips, 209.

It was further contended that the charges in the bill, upon which alone the suit could be supported, were contradicted by the answer, and that, until the right to maintain the suit should be established, the court ought not to order the production of the documents; and the case of Adams v. Fisher[1] was cited in support of this position. But the right to maintain the suit is the very question to be tried, and the production of the documents is required with a view to the evidence, and for the purpose of establishing the right. They may be, and several of them are, I think, obviously material for that purpose.[2] In the case of Adams v. Fisher, the ground upon which Lord Cottenham's decision proceeded appears to have been that it was evident from the nature of the documents, the production of which was required, that they would not assist in establishing the plaintiff's equity; they were merely consequent upon it. "Whatever," he said, "may make out the plaintiff's title, he may have a right to see. The documents in question, however, are not to make out Adams's title to have the bills taxed, and the production of them could not possibly aid the assertion of the equity which Adams has asserted by his bill."

I am of opinion, therefore, that the order should be discharged, and that the documents ought to be produced.

[1] 3 Myl. & Cr. 526. The argument of the respondents on this point, as regarded the leases, was that, from their nature, they could not afford evidence of any part of the plaintiff's case, except that which went to rebut the defence of the Statute of Limitations; and that as all the allegations of the bill which imputed to the defendants the obliteration and confusion of the boundaries (and which, it was contended, constituted the sole foundation of his right to equitable relief) were denied by the answer, the plaintiff was, on the principle of Adams v. Fisher, not entitled to the production of any documents which were material only to a subordinate issue in the cause. It was not adverted to in this argument, or perhaps in the answer above given to it, that the leases were all more than twenty years old, the latest of them being dated in the year 1815.

[2] The only documents comprised in the schedule besides the leases were certain maps and plans, and two minute-books.

COMBE AND OTHERS v. CITY OF LONDON.

BEFORE LORD ABINGER, C. B. MAY 5, 1840.

[*Reported in* 4 *Younge & Collyer*, 189.]

IN October, 1835, the mayor and commonalty and citizens of London, John Henry Liquorish, and other persons, describing themselves as members and rulers of the Fellowship or Brotherhood of the Porters of Billingsgate in the said city, and William Rushton and John Eayres, describing themselves as members or shifters or paymasters of the said fellowship, on behalf of themselves and other members of the said fellowship, filed their bill in this court against the present plaintiffs, who were partners and brewers in the Savoy, in St. Martin's-in-the-Fields, Westminster, alleging that said city of London, and said Fellowship or Brotherhood of Porters as its grantees, had a prescriptive right of measuring and carrying, for certain fees, all corn landed on either side of the river Thames, between Yantlet and Staines Bridge, and carried into or out of the city; that the present plaintiffs had landed by hired workmen, not being members of the said fellowship, large quantities of malt at their wharf at the Savoy, which they had consumed in the way of their trade, and praying for a declaration that the exclusive right of portage of all corn and grain landed from any vessel within the port of London is vested in the mayor and commonalty and citizens of the city of London, and for an account of the malt so taken.

To that bill the present plaintiffs put in an answer, alleging that the right of portage claimed by the city and their grantees had no legal origin; that such claim commenced long since the time of legal memory, and that the exercise of it, so far as it had been exercised, was of modern origin; that in the time of Henry the Third the only port in London at which corn could be landed was Queenhithe, where, under an order of the 9th year of that reign, certain dues were exacted from all foreign vessels (or vessels not belonging to the citizens of London), for the use of the king; that this order did not affect citizens of London; that by charter of the 31st of Henry the Third, Queenhithe was granted to the mayor and commonalty of the city of London, and thereupon they employed porters to carry corn and grain landed from foreign vessels; but that prior to this grant the corporation did not exercise any right

of portage either at Queenhithe or elsewhere: that in the time of Edward IV., Queenhithe, as a place of resort for vessels, was superseded by Billingsgate; that Queenhithe and Billingsgate are public markets; that the right of portage, if it exists, is incidental to the market, and does not extend beyond the public markets, or to corn not used for sale, but for private consumption; that the customs of Queenhithe and Billingsgate as to carrying corn, grain, &c., are confined to such of those articles as are brought into the city, and do not extend to such as are landed in Westminster, or any other place without the limits of the city; but that the right of portage, as far as it extends, is incidental only to the measuring of corn and grain, and that where measuring is not required there is no right of portage.

The present plaintiffs also filed this cross-bill for a discovery of documents in support of their defence to the original bill. The mayor and commonalty and citizens of London, in their answer to the cross-bill, professed to set forth on their information and belief the purport, and in some instances a statement verbatim, of the following documents, namely, a charter of the 30th October, in the 30 Hen. 3, which in the body of the answer purported to be a covenant between the Earl of Cornwall of the one part, and John De Gysors, Mayor of London, of the other part, whereby the earl granted to the mayor and commonalty Queenhithe, with its liberties and customs in fee farm, rendering the yearly rent therein mentioned; a charter of the 26th February, of the 31 Hen. 3, whereby the king confirmed the before-mentioned covenant; a finding on an inquisition of the 29 Edw. 1, before Elias Russell, Mayor of London, relating to the measuring, carriage, and portage of the corn brought to Queenhithe, stating the sums which the porters of corn were authorized to charge for carrying it to bakers, brewers, and others of the city; an act of common council of the 4 Edw. 4, relating to the landing of corn at Queenhithe and Billingsgate; a proclamation of the 9 Eliz., relating to the same matter; a report of certain aldermen in the 8 Eliz., relating to the same matter; an act of common council of the 18 Jac. 1, relating to the Fellowship Porters. But, "save as aforesaid," the defendants in substance averred that they did not know, and could not set forth as to their information or belief, whether the statements in the bill relative to the particular orders, charters, and documents mentioned in the bill were correct, or whether there were any other documents which would bear out those statements. And the defendants admitted the possession of divers royal charters, and divers books belonging to the corporation, containing copies of or extracts from ancient deeds, charters, &c., together with divers documents, evidences, and writings relating to the history of Queenhithe, &c.; but they denied that if the same were produced it would

appear from them, or any of them, that the claim of portage made by the defendants commenced within legal memory, &c., "on the contrary, these defendants say that the said royal charters and books, and the said documents, evidences, and writings, contain and are the title-deeds and documents evidencing and showing the title of these defendants and their grantees, the said Fellowship Porters, to the exclusive right of portage of all corn, &c., and are intended to be used by these defendants as evidence in their behalf in the before-mentioned suit. And these defendants say they believe that by such charters, &c., it does appear that they and their grantees have such exclusive right. And these defendants say they have in the schedule to this their answer annexed, and which they pray may be taken as part thereof, set forth a full and true list or particular of all and every the charters, &c., relating to the history of Queenhithe, &c. But these defendants submit and insist that they ought not to be compelled to produce the same or any of them, inasmuch as these defendants say that the said complainants have no interest in the same, or any right to an inspection or production thereof." The schedule to the answer comprised the charter of the 30th October, 30 Hen. 3; that of 26th February, 31 Hen. 3; that of 20th September, 6 Jac. 1; a copy of an entry in the Hundred Rolls deposited in the Chapter House, Westminster, of the 3 Edw. 1; a copy of an entry in the register of the proceedings in the Privy Council of the 29th January, 1685, kept at Whitehall, and divers repertories and journals and other corporation books, marked respectively with the letters A. to P. inclusive.

The plaintiffs having amended their cross-bill, the said defendants, by their further answer, stated that, save as therein and in their former answer mentioned, they had no knowledge or belief as to where the commission of inquisition of the 28 Hen. 3, or the finding thereon, or the orders of King Henry III., touching the port of Queenhithe, were to be found, though, if such were in existence, they ought to be enrolled among the public documents of the kingdom; but they admitted that they had lately discovered in a book in the possession of the defendants, marked A 2, an entry purporting to relate to an inquiry said to have been directed by King Henry III., in the 28th year of his reign, relative to the customs of Queenhithe, which entry being duly translated was, as the defendants believed, in the words and figures, &c. But the defendants said that such book did not form any part of the records of the said city, or of any records in the possession of the defendants, and they had no means of proving its accuracy, and, moreover, they said that it purported to be a proceeding before the king's justices in Eyre, and not an inquisition, and as such ought, if it ever took place, to be preserved among the public records of the king-

dom. And the defendants further said they had been informed, and believed, that there were amongst the public records of the kingdom two entries of orders of King Henry III. respecting Queenhithe, which, being translated into English, were, as the defendants believed, to the following purport and effect, &c.; and the defendants further said that they had lately discovered an entry in a book marked G. F., in the possession of the defendants, purporting to be a copy of an inquisition by the Mayor of London, dated the 41 Edw. 1, relative to Queenhithe, which was in the following words, &c.; and save as aforesaid, the defendants denied, to the best of their knowledge, &c., that they had in their possession any printed or other books, repertories, &c., in which the several documents in the amended bill mentioned were set forth, &c.; and they denied that the finding upon the inquisition of the 29 Edw. 1, set forth in their former answer, was not accurately or fully set forth; and they stated that they took the said finding from the said book marked A. 2, and not from any record or authentic document belonging to the defendants; and they had not discovered it in any other book or document. With respect to the act of common council of the 4 Edw. 4, the proclamation of the 9 Eliz., and the report of the 8 Eliz. they admitted that they had copies of those documents, and that they related to the resort of vessels to Queenhithe and Billingsgate; but they denied that they related to the portage or carriage of corn, or to any other matters in question between the parties, and they submitted that the plaintiffs were not entitled to inspect them. And the defendants admitted the possession of certain written books and repertories, containing notices, &c., relating to Queenhithe and Billingsgate, and to the measuring and carrying of corn and grain by the persons respectively appointed meters and porters aforesaid; and they said that such books and repertories contained, from a very early period, the proceedings of the court of aldermen and of the court of common council, and other matters and things relating to the rights and privileges of the said city. And the defendants said that they had, in the first schedule, &c., set forth a true list of all and every such books, &c., as contained any thing relating to the said ports of Queenhithe and Billingsgate, or to the measuring of corn, &c., landed from the river Thames; but they submitted that the plaintiffs had no right to inspect them, and they denied that the plaintiffs were interested in them. Moreover, they denied that, if produced, they would show that the right of portage commenced within legal memory, &c., or would furnish evidence to the plaintiffs in support of their defence in the original suit; on the contrary, the defendants said that such books, &c., contained matter which they intended to make use of against the plaintiffs in the before-mentioned suit. And the defendants denied the

plaintiffs' right to inspect any book or document relating to metage. And the defendants admitted the possession of divers cases and opinions relative to the right of measuring and carrying corn and grain landed from the Thames, — all which cases and opinions they had enumerated in the second schedule to that their answer; but they stated that such cases had been prepared with a view to the assertion of the right of metage and portage, and that the right of portage to which they referred was the same right, though claimed against other parties, as the right now claimed; that the case marked A. was prepared and answered after the matter in dispute had arisen between the defendants and plaintiffs; that it was prepared on behalf of the defendants, in contemplation of actual litigation arising out of such disputes, and that it contained statements of the evidence necessary for the support of the defendants' case. The defendants also alleged that this case was in a great measure transcribed from the cases before mentioned. They submitted that they were not bound to produce these cases.

The Fellowship Porters, by their answer, admitted that certain persons called shifters, on behalf of the said Fellowship Porters, had for a long series of years last past, but when such practice commenced the defendants did not know, &c., kept books of account, one of which was then in the possession of the defendant John Eayres, and others of which were in the possession of the defendant William Rushton (and which were particularly specified in the schedule to their answer annexed), in which were entered the amounts received by each porter for his labor of portage in landing and carrying corn and grain, and the name of the merchant or person by or on whose account the same was paid. And the defendants submitted they were not bound to produce these accounts.

A motion was now made that the defendants, the mayor and commonalty and citizens of the city of London, might be ordered to produce and leave with their clerk in court, for the usual purposes, the several charters, paper writings, repertories, journals, and corporation books mentioned in the schedule to their first answer, and also the books mentioned in their second answer to be marked with the letters A. 2 and G. F., and the paper writings or copies of documents mentioned in their said second answer to be in their possession, and the several books and repertories, and cases and answers thereto, papers, and documents, mentioned in the schedule to their second answer; and that the other defendants might in like manner produce the several accounts and books of account mentioned in the schedule to their first answer, and the several cases and opinions mentioned in their second answer.[1]

[1] The statement of the case has been materially abridged. — Ed.

Mr. *Simpkinson* and Mr. *James*, for the motion. The plaintiffs in this suit claim the production and inspection of those books and papers which *ex concessis* are admitted to relate more or less to the matter in question, and they are resisted by the mere statement, in the answer, that those books and documents, though they do relate to or contain entries relating to the matter in question, will not tend to prove the defence of the present plaintiffs. But is that any answer to the application? There are one or two instances in which the production of documents is excused. That of title-deeds is one; but these books and documents are not title-deeds, although the defendants allege that they mean to produce them in evidence. [The LORD CHIEF BARON. But suppose they are books and papers which form the evidence of usage on behalf of the defendants, are they to be produced for your inspection?] The question is, who is to be the judge whether they form evidence of usage or not. If the defendants admit that the documents relate to the matters in question, it is quite immaterial for them to say that they do not tend to prove the plaintiffs' case. We claim to be entitled to see the books and papers which relate to this custom in the same manner as we should be entitled to call upon the defendants to set forth the entries in the books relating to it. The case of the City of London *v.* Thomson [1] is a clear authority for the present application. There the defendants obtained an order to inspect the city books, and the Chief Baron said there was nothing extraordinary in the motion, and he referred to the case of the lord of a manor. [The LORD CHIEF BARON. That is a very short note, and the Chief Baron does not explain the excepted case of the lord of a manor. The reason why the lord of a manor produces his muniments is, that they belong to the tenants of the manor

[1] 3 Swanst. 265, n. [In the Exchequer, Michaelmas term, 1728. "The original bill in this case was brought for some duties claimed by prescription on the exportation of corn. The defendant denied the right, and now moved for an order to inspect the city books and their by-laws concerning this duty, and particularly entries in the cocket office.

"It was objected that the motion is irregular, for that though it is allowed between private persons and the South Sea Company, yet it ought not here, for that would be to make the city produce evidence against themselves, and the city here are in nature of a private person. Besides, no particular by-law, &c., is specified, so that the search would be infinite.

"In the cases between lord and tenant of a manor, where the tenant says the land is not part of the manor, he shall not be entitled to inspect the court-rolls, for he has barred himself by denying the land to be within the manor.

"CHIEF BARON. There is nothing extraordinary in this motion. In the case of a lord of a manor and his tenants it is constantly allowed, and the corporation being concerned in interest makes no difference, any more than where the lord of a manor is concerned in interest, and the dispute is with a tenant. It is always allowed.

"*Cur.* Of the same opinion. Rule accordingly." — ED.]

as well as to himself, and contain their title.] There are analogous cases in which production of books under similar circumstances has been allowed. Firkins *v.* Lowe;[1] Newton *v.* Beresford.[2] In the latter case, the production was opposed on the ground suggested by your Lordship, that the books to be produced formed the evidence of the party. [The LORD CHIEF BARON. That was not so put by the answer.] At all events, in both these cases the answer alleged that the plaintiff had no concern in the documents in question, and yet production was granted. Burrell *v.* Nicholson[3] is likewise an authority for the plaintiff. [LORD CHIEF BARON. That was a question of parochial boundary. A parochial officer is like a public officer in the possession of documents which may prove any man's case.] The claim made by the city comes within the reach of a certain custom. It is like the claim of suit and service by the lord of a manor. [The LORD CHIEF BARON. The lord of a manor is a public keeper of documents for the benefit of all his tenants.] The city of London are the public keepers of certain documents of a particular character, which are material to be known in order that persons taking up lands within the city may know the duties and penalties to which they are subject. Besides, the plaintiffs are not claiming the inspection of documents at hazard, but documents of which the contents are partially admitted by the answer, and which we say are not fully or accurately set forth. The plaintiffs have a clear right to the inspection of the books from which the orders set out by the defendants have been copied, and likewise the inquisition of the 29 Edw. 1.

As to the cases and opinions, it may be conceded that we are not entitled to the inspection of the case marked A.; but the other cases are not alleged to have been made in contemplation of and pending the present litigation, and therefore stand on a different footing.

Mr. *G. Richards* and Mr. *Randell*, contra, for the city of London. It is properly conceded on the other side that the plaintiffs have no right to the inspection of any of the title-deeds of the city nor the case A. But we submit that they are not entitled to any of the documents or cases of which they seek the production. We say, first, that they have shown no common title; and, secondly, that defendants propose to use the documents in question as evidence on their own behalf. With respect to the cases cited on the other side, that of the City of London *v.* Thomson is almost unintelligible. The others are clearly distinguishable from the present, for in all of them there was evidence of an interest in the party seeking the production, or of a common interest in both parties, arising from admissions in the answer. Here the

[1] M'Clel. 78. [2] 1 Younge, 377. [3] 1 Myl. & K. 680.

party applying is a total stranger to the corporation, and has no interest in any of the documents in their hands. These books and documents are as much muniments of title as deeds would be. A title-deed is not protected because it is on parchment and relates to land, but because the party holding it shall not be compelled to produce it before the hearing of the cause or action for the purposes of evidence. Bellwood *v.* Wetherell;[1] Knight *v.* Marquess of Waterford;[2] Adams *v.* Fisher.[3] With respect to the cases and opinions, it is obvious that the principle which prevents the production of cases laid before counsel in contemplation of or after the commencement of litigation, equally applies to all the cases and opinions now sought to be produced. But late decisions have excluded the production of all cases and opinions relating to the matter in question, whether old or new. Lord Brougham was disposed to hold this in Bolton *v.* Corporation of Liverpool; and although it has been sometimes said that he held the contrary, it has been ascertained that the express point never came before him. [The Lord Chief Baron. I did his Lordship great injustice; I certainly thought that on one occasion he had held the contrary.[4]] The other authorities on this point are Knight *v.* Marquess of Waterford, which was decided on great consideration, and Bushnell *v.* Bushnell.[5] They also referred to Walker *v.* Wildman[6] and Hughes *v.* Biddulph.[7]

Mr. *Spence*, for the Fellowship Porters.

Mr. *Simpkinson*, in reply. The plaintiffs have a right to the production of the copies of the several documents relating to Queenhithe. These documents confirm the plaintiffs' case. The inquisition of the 29 Edw. 1 expressly states the specific sums which the porters are entitled to charge to bakers and brewers of the city for the carriage and measurage of their corn. There is also an express finding in this inquisition, not merely that there shall be a measurement at Queenhithe, but that none shall measure for a stranger, except by permission of the bailiff of Queenhithe. Now it is part of the plaintiff's case that the measuring and portage are coextensive. But if a stranger cannot trade there, what right have the porters to say they shall measure and carry his corn? It is not a mere finding of the customs of Queenhithe, as between city and citizens, but it applies to strangers. The other documents charged in the bill and admitted by the answer all tend to the same conclusion. They must be judged of from the words of the documents themselves. If on the face of the documents they are or may be material to the plaintiffs' case, on what authority can they be withheld? It is admitted they are public documents, though

[1] 1 Y. & Coll. 211. [2] 2 Y. & Coll. 22. [3] 3 Myl. & Cr. 526.
[4] 2 Y. & Coll. 81. [5] Not reported. [6] 6 Madd. 47.
[7] 4 Russ. 190.

it is not known where the originals are to be found. Now, whatever be the value of these documents, we have a right to see whether the copies are rightly set forth in the answer, and the court must draw the necessary inference from them, and not the city.

With respect to the production of cases, it is certain that in Knight v. Marquess of Waterford some cases were produced, and in principle it is difficult to see why any should be protected but those which are framed in contemplation of or pending a litigation. All others stand on the footing of ordinary admissions in writing, and cannot in principle be considered as confidential communications. Such admissions may be made to a solicitor as well as to any one else.

The Lord Chief Baron. Nothing can be plainer than the principles on which this right of production and discovery depend. Unhappily, each case presents a new application of those principles, on which there appears to be much more difference of opinion than I should have imagined to have existed. But let us see on what the principle does depend. A party has a right to compel the production of a document in which he has an equal interest, though not equal in degree, yet to a certain extent equal, with the party who detains it from him. In that case he may file a bill of discovery in order to have the possession of it and the inspection of it. A party has also a right to file a bill of discovery for the purpose of obtaining such facts as may tend to prove his case; and if those facts are either in possession of the other party, or if they consist of documents in possession of the other party, in which he either has an interest, or which tend to prove his case, and have no relation to the case of the other party, he has a right to have them produced, and he may file a bill of discovery in order to aid him in law or in equity to exhibit those documents in evidence, or compel a statement of those facts. But does it not rest there? Has he a right as against the defendant to discover the defendant's case? Does any case go the length of that? Sometimes the cases trench very much on those limits; but if you take the question as a matter of principle, has a man a right, or is it consistent with common justice that he should file a bill to discover the defendant's case? The ground on which he files his bill is to make the defendant discover what is material to his (the plaintiff's) case; but he has no right to say to the defendant, "Tell me what your title is; tell me what your case is; tell me how you mean to prove it; tell me the evidence you have to support it; disclose the documents you mean to make use of in support of it; tell me all these things, that I may find a flaw in your title." Surely that is not the principle of a bill of discovery. And if you look at the cases, you will find, however they may occasionally trench on the line of distinction, — you will find that is the great line of distinction.

In the present case, the corporation of London, on behalf of the Fellowship Porters, who appear to be a sort of imperfect emanation of the corporation themselves, file a bill for the purpose of obtaining compensation for the Fellowship Porters for the loss of certain alleged dues for portage. I say nothing of the merits of the case, of which I know nothing; probably they may find it difficult to prove it. Then the defendants, the plaintiffs in this cause, file a cross-bill of discovery containing various charges as to some of the documents which the corporation have disclosed; and they desire the production of those documents. They call on them to state the particulars, and so on. Now, the title of the corporation and the Fellowship Porters must depend on charters, if such charters exist, or authorities issuing from the city of London, if the city of London has a right to grant such authorities in writing, or from usage from which such right may be inferred. Those are the only three grounds on which their rights can depend. If they depend on charters, has the plaintiff a right to say, let me see your charters on which you found your right? If they depend on documents, acts of the common council, or orders of the mayor, you may question the authority of the mayor to make the orders, — you may question the authority of the common council to pass such acts, but have you a right to ask for the documents themselves? That is not the object of a bill of discovery. Again, have you a right to say, let us see the evidence of your usage; let us see, from documents in your possession, how long it has lasted? You have no right to say that. If you have, they may say, let me look at your case, that I may discover the defects of it to defend myself. That is not the object of a bill of discovery. But there may be a case in which a party, situated as the corporation of Fellowship Porters are in this case, may have a document in their possession very important to the other party, which is not depending in the suit at all. Put this case: that some action had been brought by the corporation of Fellowship Porters, or some bill had been filed for the purpose of recovering these very dues of trade, and that the case had been compromised, that the city of London had paid a sum of money for the costs, and there happened to be among their muniments an entry of the sum so paid by their treasurer; the treasurer having paid the money, so that they could prove his handwriting to the document. Such a thing would be of the greatest importance to the person against whom they brought their action, and in that case he would have a right to say, you have such a document, which is very important to my case, for it shows that you tried to make good a case against a former defendant, that he defeated your attempt, and you have paid him the costs, and you have the means of proving that. That is no part of the title of the plaintiffs at law, but it is part

of the title of the defendant at law, and he may say, as I have not that document, you must produce it. Now that is a case to show that a party may demand the production of that which in some degree he has an interest in, as evidence to prove his own case or defeat his adversary's, but he does not thereby attempt to examine his adversary's title.

Now, apply that to the present case. If I saw plainly in this case that the documents which are admitted to be in possession of the corporation either had no relation at all to the case of Messrs. Combe & Co., or if I saw they had a clear relation to the corporation's case, and formed part of their evidence, I should think there was no ground at all for this motion. But there are certain of the documents which, from a very early period of the discussion, I have been looking at to see how they could affect the case. Now, the Fellowship Porters cannot claim any right under the orders to establish Queenhithe as the place where foreign corn was to be landed; they have no relation to that at all. So the inquisition taken before the justices in Eyre: I do not see that that has any relation to their case at all; I cannot imagine how it can be introduced as evidence for them. So, again, the order or the inquisition of the Lord Mayor of the name of Russell, 29 Edw. 1, does not appear to me to touch the case of the corporation of Fellowship Porters at all. Again, the order of the common council in the time of Edward IV., that all ships might go to Billingsgate as well as Queenhithe; and again, the copy of Elizabeth's proclamation, these appear to me not to be documents that are at all relevant to the title which the Fellowship Porters claim. But I will tell you in what way they may affect the claim,—I do not say they will do so, but still they may give rise to an argument that at the particular period when those documents existed or first had place, no such claim as that of the Fellowship Porters had any existence, and, therefore, that it is of very modern origin. *Valeat quantum*, I cannot tell whether that will make the claim bad or good; still I cannot say it might not be important evidence for the plaintiffs in equity. If it is important evidence for the plaintiffs in equity, and if it does not exist anywhere but in the muniments of the corporation, and they cannot avail themselves of it as any part of their title, I see no reason why it should not be produced, subject to all exceptions, one of the exceptions being that it is no evidence in the case. I have no doubt that if they are mere copies of originals that cannot be proved to have existed, they will be no evidence; but still there may be something in the entries of the copies in the corporation books that may make all of them evidence against the corporation. For instance, as to the inquisition, it may turn out that the practice of the corporation was to keep all copies of inquisitions made before the mayor, and that this is so attested, in some way, as to make it evidence

against the corporation, although it would not be evidence against third persons. It appears to me these documents should be produced, but that they should be produced as single documents in the book in which they are contained, and that there is no title to see the remaining contents of that book.

With respect to the Fellowship Porters' book, it is asking the defendants in equity to lay their case before the plaintiffs in equity, that they may find out an objection. The constancy of the usage may be a very essential ingredient in support of it, and their books must prove the case one way or the other; it is clear, therefore, that the plaintiffs have no right to see the books to ascertain whether the defendants have charged more or less at different times. That is asking for a discovery of the weakness of their adversaries' title, and not of the strength of their own.

Then with respect to the cases, I am clearly of opinion that they ought not to be produced. I adopt the grounds suggested by Mr. Richards, that those cases are stated to be prepared with a view to litigation. No doubt what Mr. Simpkinson says is very just, that in asking for the production of a case you in effect ask the defendant whether he has not said so and so, — a form of inquiry which is constantly adopted in bills, and I hope to live to see the day when it will be a little abridged; but if you have a right to ask the defendant to give you a case which is stated to counsel with a view to litigation, you have a right to ask him to give you the evidence of his whole title, for what is a man to do who states a case for counsel, but to state that case and the evidence to support it? It is clear, therefore, that a party has no right to ask for the production of a case stated with a view to litigation, whether the litigation actually takes place or not.

Ordered, that the plaintiffs have liberty to inspect, at the town-clerk's office, the copies of the orders of Hen. 8, the inquisitions of Hen. 8 and Edw. 1, and the findings thereon, the order of the common-council of Edw. 4, the report and order of 8 Eliz, and the proclamation of 9 Eliz. No order made as to the other documents.

HARVEY COMBE, JOSEPH DELAFIELD, AND WILLIAM DELAFIELD *v.* THE MAYOR AND COMMONALTY AND CITIZENS OF THE CITY OF LONDON, JOHN HURCOMBE, AND JOHN EAYRES, AND HENRY WOODTHORPE.

BEFORE SIR J. L. KNIGHT BRUCE, V. C. JUNE 2 AND 9, 1842.

[*Reported in* 1 *Younge & Collyer's Chancery Cases*, 681.]

BEFORE LORD LYNDHURST, C. JANUARY 26, 27, 28, AND 30, 1843; AND DECEMBER 20, 1845.

[*Reported in* 15 *Law Journal Reports, Chancery*, 80.]

THIS was a cross-bill, substantially like the preceding, except that the original bill in aid of the defence to which it sought discovery, was for the recovery of fees claimed by the city of London for metage instead of portage.

It was alleged in the cross-bill that it appeared by the books of the corporation and their deputies, and the fact was, that until late years the corporation did not claim metage beyond the local limits of the city; that the claim of metage to the westward of the local limits was not made till about thirty years ago, and, in many instances, as would appear from books and papers in possession of the corporation, had been defeated or submitted to through fear or misapprehension of the rights of the parties; and that the claim of metage in private wharfs westward of the local limits of the city had not been made till about ten years since.

It was also alleged that the defendants had in their possession, custody, or power, divers accounts and books of account, in which entries had been made of all corn, malt, and grain, and other articles measured by the corn-meters during a long series of years, together with the names of the persons on whose behalf, and the times and places at which such measuring had been made, and the fees and wages therefor; and that if such books and accounts were produced it would thereby appear that the right of measuring corn, malt, grain, and other articles claimed by the corporation, had not been exercised at any place above or to the west of the city of London longer than thirty years last past; and that at some of the places at which corn, malt, and other grain had been imported for a long series of years between Staines Bridge and the city aforesaid, it had not been exercised longer than three or four

years last past, and that at others of such last-mentioned places it had never been exercised at all; and that such alleged right had not been exercised until late years at any of the places lying on the banks of the said river Thames below or to the east of the said city, although at many of such places corn, malt, and grain had, from time immemorial, or for a long series of years, been imported and landed from vessels on the said river Thames; and it would further appear from the said books and accounts, if produced, that the rates of fees, wages, and rewards claimed and received on account of the metage aforesaid, and the labor incidental thereto, had from time to time varied.[1]

The defendants, Hurcombe and Eayres, by their answer, admitted that all the books of account and accounts relative to the metage, had been for some time past kept by them. They denied that, if the said books of account were produced, it would appear that the right of metage claimed by the corporation was not exercised at any place above or to the west of the city longer than thirty years ago. They then mentioned several places to the west of the city, as Kingston, Battersea, &c., at which metage had been done at an earlier period, as to which there were entries in the books, and they set forth the earliest entries respecting the metage at those places. They stated that it had not been the practice to specify in the entries, relative to metage below or to the eastward of the city, the names of the particular places where the metage was done. At a subsequent part of their answer they stated that "they have hereinbefore set forth and discovered the names of all places on the banks of the said river, other than those which are in the said city of London, at which the exercise of the said right of metage is shown or appears by any entries in the said books of account which these defendants have met with; but these defendants say that such books of account are numerous, and may contain the names of many other places than such as are hereinbefore mentioned at which the right of such metage has been exercised; but, save as hereinbefore is mentioned, these defendants deny, to the best of their knowledge, information, and belief, that it would appear by the said books of account, or any or either of them, if produced, that the rates of the fees, wages, and rewards claimed or received on account of the metage aforesaid, or the labor incidental thereto, have from time to time, or at any times or time, varied; and, save as hereinbefore is mentioned, these defendants deny, to the best of their knowledge, information, and belief, that in fact the rates of the said fees, wages, or rewards for such metage as aforesaid, or the labor incidental thereto, or any or either of them, have or has, from time to time, or at any time or times,

[1] To this point the statement of the case has been materially modified and abridged. — Ed.

varied, or that the fees, wages, or rewards now charged in respect of metage, except the said fee of 8*d.* and 10*d.* in the name of fillage, or any or either of them, have not always been uniform, or have not existed from time immemorial," &c.

The defendants, the corporation of London and Henry Woodthorpe, by their answer, denied the principal allegations contained in the bill of discovery relative to the claim in question. With respect to the metage books, they averred as follows: "And these defendants say that all the books of account and accounts relative to metage are kept by the respective persons hereinafter named, and none of such books of account or accounts are in the actual possession or custody of these defendants, or either of them; and these defendants have not had occasion for many years to examine or inspect the same, except that these defendants, the mayor, &c.,[1] say they have lately caused the said books of account and accounts to be examined, and the same relate to dues and wages and receipts of the said corn-meters, for the metage of corn and grain in exercise of the said right; and such books of account contain entries which these defendants, the mayor, &c., are advised and believe form most material evidence in support of their exclusive right of metage within the limits aforesaid, and which books of account these defendants last named intend to make use of in evidence, on the hearing of the cause between these defendants last named and the said plaintiffs in support thereof. However, these defendants, the mayor, &c., say that they have hereinafter set forth, according to the best of their knowledge, information, and belief, the earliest entries in the said books of account respecting such metage." The defendants, at a subsequent part of their answer, stated that the earliest entries respecting such metage at private wharves west of the city, in such books of account, were in the words and figures following, that is to say: 1739, January 16th, Isaac Streley, Windsor, Melford Lane, &c.; "but they believe that many of the older books of accounts have been lost. And these defendants say that the said books of account now in existence are numerous, and these defendants have not met with any entries therein of metage done at any private wharves westward of the said city of London, except at such several places as are hereinbefore mentioned."

In a subsequent part of their answer the defendants stated as follows: "They believe it to be true that the corn-meters have in their possession, subject to the inspection of these defendants, the mayor, &c., divers books of account containing entries of or relating to all or the greater part of the corn, malt, and grain which have

[1] The words "mayor, &c.," are intended to express "The Mayor and Commonalty and Citizens of the City of London," without the defendant, Henry Woodthorpe.

been measured by them, or by the corn-meters of the city of London since the year 1699; and that such books of account are deposited in the office or place of resort of the said corn-meters, situate at Great Tower Street and Brook's Wharf, in the said city of London, and are in the possession of the said John Hurcombe and John Eayres; and these defendants admit that these defendants, the mayor, &c., have access to the said books of account, and are entitled to inspect and take copies of the same; and these defendants, the mayor, &c., say that they never in fact, until after they were called upon to put in their answer to the said bill, inspected the same, the same having been kept entirely by and under the sole inspection and control of the said corn-meters, whose interests the said books relate to and concern. And these defendants say that none of such books are or is in the actual custody or possession of these defendants, or any of them; but these defendants believe that all of such books as now exist are in the actual possession and custody of the defendants, John Hurcombe and John Eayres, or one of them. And these defendants admit that the said books have been kept by the said corn-meters, as the deputies of the said corporation of London; and that some of the said books of account do contain entries of the names of some of the persons on whose behalf, and of some of the places at which, such measuring has been made, and of some of the respective times since the year 1699 when such measuring was done, and of some of the fees, wages, and rewards received for such measurings respectively," &c. "And these defendants, the mayor, &c., say that such of the said books of account as they have caused to be inspected, as hereinbefore is mentioned, and as they have been informed and believe are now known to exist, do not go further back, and do not contain any entry of an earlier date than the year 1699. And these defendants deny that, if the said books of account were produced, it would appear thereby, or by any or either of them, that the right of metage claimed by the bill of these defendants, the mayor, &c., was not exercised at any place above or to the west of the said city of London longer than thirty years ago. And these defendants, the mayor, &c., say that the earliest entry in the oldest of the said books of account known to the defendants last-named, &c., is, &c. And these defendants, the mayor, &c., deny that it would appear by the said books of account, or any or either of them, if produced, that the said right or franchise of metage was not exercised, &c., between Staines Bridge and the said city of London respectively, longer ago than three or four years from the time in the said bill in that behalf mentioned; and these defendants say that the earliest entry in the said books of accounts, or any of them, known to these defendants last named, of the exercise of the said right of metage at

Kingston, is in the words and figures following, &c. And these defendants say that the earliest entry in the said books of account, or any of them, which these defendants have met with of the exercise of the said right of metage at Wandsworth, is in the words and figures following," &c. [Then followed similar allegations as to metage at Battersea and other places.] "But these defendants, the mayor, &c., say that it does not appear by the said books of account, or any of them, as they believe, and these last-named defendants have no means of knowing, whether the metage which was done at the several and respective towns and places hereinbefore mentioned above or to the west of the said city of London, was done at public or private wharves there, or at what particular wharves or places such metage was done; and although these defendants, the mayor, &c., say they have not discovered any entries or entry in such books of account, or any or either of them, of the exercise of such right of metage at Chertsey, &c., yet these defendants believe that such right of metage has been always exercised at such several last-mentioned places, &c.; and these defendants deny, to the best of their knowledge, information, and belief, that it would appear by the said books of account, or any or either of them, if produced, that the said right of metage has not been exercised at any of the places lying on the banks of the said river below or to the east of the said city, until late years."

The defendants, the corporation, then stated their belief that it had not been the practice to enter in the books of account the names of places in respect of metage done below or to the east of the city of London, such metage usually taking place on board the vessel, &c.; and the defendants, collectively, stated their belief that the earliest entry which they had met with as to metage below the city was thus, — "April, 1699," &c.; and they believed that very little, if any, corn, &c., was landed between Staines Bridge and Yantlet, where the cornmeters had not exercised, and did not continue to exercise, the right of metage. "However, for the reasons herein mentioned, these defendants do not know, and cannot set forth as to their belief or otherwise, whether the said books of account, or any of them, do or does contain any entry whatever relating to the exercise of the said right of metage at any or either of the towns or places in the said bill named, or other towns or places on the banks of the said river between Staines Bridge and Yantlet Creek aforesaid, except such as are hereinbefore in that behalf mentioned; and these defendants, the mayor, &c., say they have hereinbefore set forth and discovered the names of all places on the banks of the said river, other than those which are in the said city of London, at which the exercise of the said right of metage is shown or appears by any entries in the said books of account which these

defendants have met with; but these last-named defendants say that such books of account are numerous, and may contain the names of many other places than those which are hereinbefore mentioned at which the right of metage has been exercised; but, save as hereinbefore is mentioned, these defendants deny, to the best of their knowledge, information, and belief, that it would appear by the said books of account, or any or either of them, if produced, that the rates of the fees, wages, or rewards claimed or received on account of the metage aforesaid, or the labor incidental thereto, have from time to time, or at any times or time, varied."

In answer to the charges of possession of documents, the defendants denied that the act of common council, proclamation, report, and orders related to the claim of metage or portage, or any of the matters in question. They also denied, generally, the possession of documents relating to the matters in the bill mentioned, "except that these defendants say there are in the custody, power, or possession of these defendants certain written books and repertories, which are mentioned and set forth in the first schedule to this their answer annexed, and which they pray may be taken as part thereof, which books and repertories form a part of the records of the said city of London, which contain entries of divers matters and things which these defendants, the mayor, &c., are advised and believe form most material evidence of their said exclusive right of metage, and which these last-named defendants intend to make use of against the said complainants in the before-mentioned suit in support of their said right; and these defendants admit that they have in their possession a book marked B., containing an entry purporting to be an account of certain dues and charges payable to the Crown in the time of King Henry the Third, in respect of vessels coming to Queenhithe, or in respect of the port or landing of articles and things at Queenhithe; but these defendants say that the said book marked B. does not form any part of the records of the said city, or of any records in the possession of these defendants, and these defendants have no means of knowing whether the said entry contains a true reference to or representation of the matters or things to which it purports to relate; however, these defendants, the mayor, &c., say that the said book marked B. contains entries of divers matters and things which these last-named defendants are advised and believe form most material evidence of their said exclusive right of metage, and which these last-named defendants intend to make use of against said complainants in the before-mentioned suit. But, save as aforesaid, these defendants deny, to the best of their knowledge, information, and belief, that these defendants, or any or either of them, or any other persons or person, by the order or for the use of them, or any or either of

them, have or hath, or had lately in their or his possession, power, or custody, any documents or document relating to the dues and charges received by the bailiffs," &c. [following the words of the bill]. The defendants then admitted that they had in their custody or power certain written books and repertories containing statements, or purporting to contain copies and extracts from documents, relating to Queenhithe and Billingsgate, and the measuring of corn, &c., which books and repertories, as they alleged, contained, from a very early period of time, the proceedings of the court of aldermen and court of common council, and other matters relating to the city and its privileges; and the defendants stated that the said books and repertories were referred to or contained in the first schedule to their answer, but the defendants submitted that the plaintiffs were not entitled to inspect them, and that the defendants ought not to be compelled to produce them, for the defendants denied that the plaintiffs had any interest therein, or in any or either of them. "Moreover, these defendants deny, to the best of their knowledge, information, and belief, that if the said books, repertories, documents, evidences, and writings, or any or either of them, were or was produced, it would appear by them, or any or either of them, that the said right of metage commenced within the time of legal memory, or that the right thereto is confined to the said city of London, or the public quays or wharves or markets situated within the said limits, or that the said books, repertories, documents, evidences, and writings contain or would furnish evidence on behalf of the said complainants, and in support of their defence to the said suit commenced by these defendants, the mayor, &c., against the said complainants; on the contrary, these defendants say they are advised and believe that such books, repertories, documents, evidences, and writings contain entries of divers matters and things which these defendants are advised and believe are most material evidence in support of the said right of metage."

In answer to the charge of possession of cases and opinions, the defendants admitted "that they have in their possession, custody, or power divers written cases and answers thereto, relating to the right of measuring and carrying corn and grain landed from the Thames; and these defendants say they have, in the second schedule to this their answer annexed, and which they pray may be taken as part thereof, set forth a list or schedule of all such cases and answers thereto. However, these defendants say that the said cases consist of three sorts: first, cases relating to the right to metage and portage; secondly, cases relating to the right to metage only; thirdly, cases relating to the right of portage only: and these defendants say that all the said cases were prepared by the solicitor or legal adviser of the corporation

of London on their behalf, either after litigation upon the subject of such cases had commenced between the said corporation and parties disputing their rights, or in contemplation of litigation upon the subject-matter of such cases, and with a view to the assertion in such litigation of the rights of the said corporation to metage and portage. And these defendants say that all such cases set out and contain statements of the evidence of the defendants relating to the subject-matter of such cases respectively, to be used in case of litigation ensuing in respect of the subject-matter of such cases; and such cases, and especially such as relate to metage, set out and contain statements of evidence which these defendants believe to be most material, and which they intend to adduce in support of their right in the suit commenced by these defendants against the said complainants, for an account of what is due to these defendants from the said complainants in respect to the metage of malt which the said complainants have caused to be landed at the said Duchy Wharf and elsewhere on the river Thames, within the limits aforesaid, and which right of metage is the same as the said right, respecting which the said cases were prepared and written as aforesaid; and these defendants say that all such cases as contain answers were submitted to and contain the opinions amongst other counsel of the law officers of the corporation of London, who are their sworn legal advisers; and these defendants say they have distinguished in the said second schedule the said cases, by figures, &c.; and these defendants submit and insist that they ought not, under the circumstances herein mentioned, to be compelled to produce, and that the said complainants are not entitled to inspect, any of such cases, or any part or parts thereof respectively, or the opinions or answers given thereon, or any of such opinions or answers; and these defendants say that such cases were prepared and answered between the years 1799 and 1835; and these defendants deny that all such cases were prepared and answered before the matter in dispute in the said suit was agitated between these defendants and the said complainants."

A motion was now made for the production by the defendants, the corporation, of the several charters, proclamations, reports, orders, paper writings, or copies of documents, and the several books and repertories mentioned in their and the defendant Henry Woodthorpe's answer in this suit, or in the first schedule thereto, and also the several cases and answers thereto mentioned in the second schedule to the said answer, and for the production by the defendants, Hurcombe and Eayres, of the several accounts, books, and documents mentioned in their answer to this suit, and the schedule thereto.

Some of the documents comprised in the above notice of motion had

already been ordered to be produced by Lord Abinger, C. B., in the cross-suit to the suit for portage.[1]

Mr. *Simpkinson* and Mr. *James*, for the plaintiffs.

Mr. *G. Richards* and Mr. *Randell*, for the defendants.

Upon the question of the production of the documents generally, the following cases were cited for the plaintiffs: Bolton *v.* Corporation of Liverpool,[2] City of London *v.* Thomson,[3] Firkins *v.* Lowe,[4] Newton *v.* Berresford,[5] Burrell *v.* Nicholson,[6] Smith *v.* Duke of Beaufort,[7] Bannatyne *v.* Leader,[8] Latimer *v.* Neate,[9] Taylor *v.* Milner,[10] Combe *v.* City of London.[11] As to the production of cases and opinions, Nias *v.* Eastern Railway Company,[12] Greenlaw *v.* King;[13] and, with respect to the materiality of the charters to the plaintiffs' case, by reason of the expression "port of London" occurring in one of them, Kingston-upon-Hull Dock Company *v.* Browne.[14]

The following authorities were cited for the defendants: Wigram on Discovery, 275 (2d ed.); Bligh *v.* Benson,[15] Glegg *v.* Legh,[16] Bellwood *v.* Wetherell,[17] Richards *v.* Jackson,[18] Adams *v.* Fisher,[19] Hughes *v.* Biddulph,[20] Walker *v.* Wildman,[21] and, with respect to the cases and opinions, Knight *v.* Marquess of Waterford.[22]

June 9.

The VICE-CHANCELLOR. In this case the defendants have conceded (without prejudice to their right of resistance to any other part of the motion) the production of such of the documents admitted to be in

[1] See 4 Y. & C. 159. It appeared from the schedules to the respective answers in the portage and metage suits that the documents referred to in those schedules respectively were, for the most part, identical. The following is a more precise description than appears in the report of the case in the Exchequer of the documents which the Lord Chief Baron ordered to be produced, viz.: the entry in book A. of an inquisition or inquiry made in the 28th Hen. 3; the paper writings purporting to be copies of the orders of Hen. 3; the entry in the book G. F. of an inquisition of the Mayor of London in the 41st Edw. 3; the entry or copy in book A. of the inquisition before Elias Russell, Mayor of London, made in the 29th Edw. 1; the paper writings purporting to be copies of an act of common council of the 4th of Edw. 4, and of a proclamation issued or made in the 9th of Eliz.; and of the report of certain of the court of aldermen, made in the 8th of Eliz., and the paper writings purporting to contain an account of the dues and charges payable to the Crown in respect of vessels coming to Queenhithe, or in respect of the port or landing at Queenhithe. Liberty was given to the plaintiffs to take copies or extracts.

[2] 3 Sim. 467; see p. 490; 1 Myl. & K. 88.
[3] 3 Swanst. 265, n.
[4] M'Clel. 78; 13 Price, 193.
[5] 1 Younge, 877.
[6] 1 Myl. & K. 680.
[7] 1 Hare, 507.
[8] 10 Sim. 229.
[9] 11 Bligh, 112; 2 Y. & C. 257.
[10] 11 Ves. 41.
[11] 4 Y. & C. 139.
[12] 8 Myl. & Cr. 855; 2 Keen, 76.
[13] 2 Beav. 137.
[14] 2 B. & Ad. 48.
[15] 7 Price, 205.
[16] 4 Madd. 193.
[17] 1 Y. & C. 211.
[18] 18 Ves. 474.
[19] 3 Myl. & Cr. 526.
[20] 4 Russ. 190.
[21] 6 Madd. 47.
[22] 2 Y. & C. 87.

their possession or power as the Lord Chief Baron directed to be produced in the cause before him. The documents which they did not concede, and as to which I reserved my decision, were, first, certain cases and opinions; secondly, certain charters of King James the First and King Charles the First; thirdly, the corn-meters' books; and, fourthly, certain other books and repertories. As to the first class, the cases were prepared and the opinions taken under circumstances which are thus stated by the defendants — [His Honor here read the passage within inverted commas, commencing, *ante*, p. 607].

The circumstances thus stated are, I think, sufficient to protect these documents; it not being in my judgment, material to the question that the litigations to which some of them at least related were litigations with other parties than the plaintiffs in the present cross-bill. As to metage, the alleged right in dispute was the same; and as to portage, neither is that alleged right destitute of all connection with the other, nor is it at this moment otherwise than in litigation between the actual parties on this record. I conceive that, according to principle, I ought not to make any order as to these documents, and that there is not any authority which compels me to do so.

With regard to the three other classes, my opinion is different. To protect a defendant from the discovery or production of a document relating to the subject of dispute, it is not sufficient that it should be evidence of his title, or contain evidence that he intends and is entitled to use in support of his case. It may also be of a similar character with regard to the plaintiff's case, either in a directly affirmative manner, or by exhibiting matter at variance with the defence, or tending to impeach it. I do not at present refer to the instances in which a document forms the common title, or is a subject of the mutual and common right of the plaintiff and defendant. If it be with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title, and is intended to be, or may be, used by him in evidence accordingly, and does not contain any thing impeaching his defence, or forming or supporting the plaintiff's title or the plaintiff's case, — that document is, I conceive, protected from production, unless the court sees upon the answer itself that the defendant erroneously represents or misconceives its nature. But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then, I apprehend, the document is not protected; nor, I apprehend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness. Believing these tests to be founded in principle, and

warranted by authority, I have tried by them the three classes of documents which I am now considering, and the result is as I have stated.

With regard to the charters, without laying any stress on an expression which was the subject of some remark during the argument (that of "the port of the city of London"), I conceive that each of them is shown to contain matter which may be rationally contended to support the case of the plaintiffs, and impeach or weaken that of the defendants. I do not express or intimate any opinion whether that will or ought to be the result. It is sufficient for me to see that, according to my judgment, the matter is such as the plaintiffs' legal advisers may by a reasonable possibility fairly so use. The defendants put their case upon prescription, claiming by a title superior to the charters, and to which neither of the charters was necessary.

With regard to the metage books, and the other books and repertories, their protection appears to me to fail in the other part of the test which I have stated.

I do not doubt that they contain some matter which is evidence, and neither more nor less than evidence, in support of the defendants' case. But is there no other relevant matter which they contain? This a question which, in my opinion, is not answered, or not satisfactorily answered, by the defendants. The documents are numerous, and probably voluminous; and it appears to me consistent with every answer on the record, that the examination to which they have been subjected may have been lax and defective. I cannot find a positive statement anywhere that their whole contents are merely and exclusively matter of evidence in support of the defendants' case, or irrelevant to that of the plaintiffs'; nor can I discover an averment that any person who has examined those documents has positively stated, or can positively state, that their whole contents are so.

In the answer of Hurcombe and Eayres there is this statement. [The Vice-Chancellor here read the passages within inverted commas, commencing, *ante*, p. 602, and observed that it was remarkable that in a question of so much importance as that of the variance of the fees and wages for metage, the defendants, the corn-meters, should state that the books might contain other matters than those which they had mentioned, and yet in the same sentence deny, but only according to the "best of their knowledge, information, and belief," that there had been any variance. And his Honor, from this and other similar passages in the same answer, drew the inference that the examination of the books had not been precise and complete. He then read the passages within inverted commas in the answer of the Corporation and Woodthorpe, commencing, *ante*, p. 603, and concluding

at p. 607, at the same time commenting upon the absence of the junction of Woodthorpe in some of the most important allegations; and the want of precision, compared with the positive statements in other matters, with which it was denied that the books contained entries showing the variance in the fees and wages for metages. With respect to the claim made by the defendants for the protection of their charters and repertories, he referred to the observations made at the beginning of the judgment, upon the general principles on which, in his opinion, the right to protection rested. He then said:] If there are any passages materially more favorable to the defendants on the present motion than these, I am not aware of them. That these are sufficient for the purpose of protection, I cannot agree. The charters, books, and repertories must therefore, in my opinion, be produced (but not until after the 23d instant), in the same manner as the first-mentioned documents; with liberty to conceal on affidavit such parts as do not relate to any matter in question in the cause. I say after the 23d instant, in order to afford the defendants the opportunity of applying to the Lord Chancellor by appeal from my present decision; an application which I wish to be understood as neither encouraging nor discouraging.

A motion having been made before the Lord Chancellor to discharge the foregoing order,

Mr. *Simpkinson* and Mr. *W. M. James* appeared for the plaintiffs; and

Mr. *G. Richards* and Mr. *Randell*, for the corporation.

December 20, 1845.

The Lord Chancellor. This was a motion to discharge an order of Vice-Chancellor Knight Bruce, for the production of documents mentioned or referred to in the answer of the defendants.[1] . . .

The first question for consideration relates to the books of account kept by the corn-meters. The plaintiffs insist in their bill, among other things, that the rates of charge have varied, and that this will appear upon inspection of these books; and the statement in the bill is, that the defendants have in their custody, possession, or power divers accounts, or books of account, in which entries have been made of all corn, &c., measured by the corn-meters during a long period of years, together with (among other things) the fees and wages received for such measuring; and that, if such books of account were produced, it would thereby appear that, among other things, the rate

[1] His Lordship's statement of the case has been omitted. — Ed.

of fees, wages, and rewards claimed and received on account of the metage aforesaid, and the labor incidental thereto, have from time to time varied. The bill, therefore, charges the possession of these documents, and that they relate to the matters in dispute in this suit, namely, among other things, the metage and the fees and wages paid in respect of it; and if they exhibit a variance in the amount of the rates paid at different periods, it is obvious that such evidence would be material for the plaintiffs at the hearing of the cause. The defendants, the corn-meters, in their answer, admit the possession of these books of account, and say, not positively, but to the best of their information and belief, that it will not appear from them that the fees and rates of charge have varied; and they further state that these accounts, or books of account, contain material evidence for the corporation, and that they are intended to be used in support of their claim. But the material question is, whether they do not also contain, by the alleged variance of charge, evidence for the plaintiffs. This is denied only according to the information and belief of the defendants. In Bannatyne *v.* Leader, the Vice-Chancellor of England considered, and, I think, properly, that it was not sufficient in a case of this kind to swear merely to the defendants' belief. It further appears from the answer that the examination of the documents by the defendants, the corn-meters, had been imperfect, for in another part they set out the names of certain places where the measurement had taken place out of the city of London, being, as they state, all that they had met with; but they add that the accounts are numerous, and there may be many others besides those they have mentioned. The number of the documents is not a sufficient excuse for an imperfect examination of them, as the court would, upon a proper application, allow the necessary time to prepare a sufficient and satisfactory answer.

The same objections apply to the answer of the corporation with respect to the town clerk. It does not always very distinctly appear when he is meant to be included under the description of "these defendants," but if he denies at all that the accounts will show that the payments have varied, he states this only according to information and belief, and there is sufficient also in his answer to show that if he has examined the accounts the examination has been partial and imperfect. I am of opinion, therefore, that these accounts must be produced.

The next question relates to the books and repertories mentioned in the first schedule. The defendants, namely, the corporation and their town clerk, say in their answer that, save as therein is mentioned, they deny that they have in their possession any book or books relating to the matters in the bill mentioned, except that there are in the custody or power of the defendants certain written books or repertories set

forth in the first schedule, which contain entries of divers matters and things which the defendants believe form material evidence as to their exclusive right of metage, and which they intend to use in support of their right; and in a subsequent passage they expressly admit that the books and repertories mentioned in the first schedule contain copies and abstracts, or extracts, from documents relating to the measuring of corn and grain by the meters, and they admit the possession of such books and repertories, but they deny that the plaintiffs have any interest in them; and, further, they deny, to the best of their knowledge, information, and belief, that, if they were produced, it would appear by them that the right had commenced within the time of legal memory, or that they contain or would furnish evidence on behalf of the plaintiffs; on the contrary, they say they are advised and believe that they contain entries which they are advised and believe are most material evidence in support of the said right of metage, and which they intend to make use of in support of their said exclusive right against the plaintiffs.

There is in these passages a sufficient admission that the books and repertories set forth in the first schedule relate to the matters mentioned in the bill. The only question, therefore, is, whether any sufficient reason is assigned why they should not be produced. The defendants deny that the plaintiffs have any interest in them; and, further, they deny, to the best of their knowledge, information, and belief, that, if produced, they would show that the right had commenced within the time of legal memory, or that they would furnish evidence on behalf of the plaintiffs. The plaintiffs do not claim the right to the production of the documents on the ground of their having any interest in them, in the common acceptation of that word, but as containing evidence in their favor in support of the allegations contained in the bill; and this is denied by the defendants, the corporation and the town clerk, only according to the best of their knowledge, information, and belief, which, as I have already stated, I do not think sufficient. They further add that these books and repertories contain, as they are advised and believe, entries which form most material evidence of their exclusive right of metage, and which they intend to use in support of their right; but this will not entitle them to withhold the documents, unless they also deny, with sufficient certainty (which they do not), that they contain evidence in support of the case of the plaintiffs.

It was further objected that the bill only charged that these books related to the matters in question, and that it was not alleged that, if produced, they would establish the case of the plaintiffs, and that it was only admitted by the answer that the accounts related to the matters in question in the cause; but this admission alone will *prima facie* entitle the plaintiffs to inspect them. Smith *v.* The Duke of Beaufort,

Storey v. Lord George Lennox,[1] Tyler v. Drayton,[2] and other cases. It is not necessary that more should be stated in the bill, or that more should be admitted by the answer.

It was also said that the documents were required merely to negative the case of the corporation, and that the plaintiffs had no right to require the production for that purpose; and the case of Bolton v. The Corporation of Liverpool was cited as establishing that position. But the ground upon which the production was there refused seems to have been that the documents were required merely for the purpose of ascertaining whether they contained any thing tending to disprove the title of the corporation, not for the purpose of proving, as in the present case, the facts alleged in the bill, and which, if established, would defeat the plaintiffs' claim. Here the plaintiffs charge affirmatively that the payments have varied at different periods, that this will be shown by the accounts when produced, and the statement is not positively denied, but only according to information and belief, in the answer. When documents are charged and admitted to be in the defendant's possession, relating to the matters in question, it must depend upon the sufficiency of the answer whether the court will order the production of them.

The remaining question relates to the charter of the 6 Jac. 1, and the charter of Car. 2. The charter of the 6 Jac. 1, either the original or a copy, but as I read the answer the original, and the charter of Car. 2, are admitted by the defendants — the mayor, aldermen, and commonalty, and the town clerk — to be in their possession, and they clearly relate to the matters mentioned in the bill; those may be material to the plaintiffs' case, for they tend to show that the right is confined to corn, &c., imported for the purpose of sale. In one part of their answer the defendants say that the charter of the 6 Jac. 1 is not necessary to their case; but in a subsequent time they state that the charter of Car. 2, in which the charter of the 6 Jac. 1 is recited, forms part of the evidence of their title to the said exclusive right of metage; but they nowhere, so far as I can discover, state that they do not afford evidence in support of the plaintiffs' case.

Beyond the facts which I have stated, there is nothing relied upon as a reason why the charter should not also be produced.

There is no ground, therefore, for discharging any part of the Vice-Chancellor's order, and the motion must consequently be refused with costs.

[1] 1 Myl. & Cr. 525; s. c. 6 Law J. Rep. n. s. Chanc. 99.
[2] 2 Sim. & Stu. 309.

HAVERFIELD v. PYMAN.

BEFORE LORD COTTENHAM, C. JANUARY 23, 1847.

[*Reported in* 2 *Phillips*, 202.]

THIS was a motion to discharge or vary an order of the Vice-Chancellor of England, made after an amendment of the bill, for the production of documents comprised in two schedules to the answer to the original bill.

The original bill stated that one of the defendants, a married woman, being entitled for life to her separate use to a certain farm, the legal estate in which was vested in three of the other defendants as trustees, she, on the 1st of March, 1843, entered into an agreement with the plaintiff to grant to him a lease of the farm for seven years from the 25th then instant, at a certain yearly rent, it being thereby amongst other things provided that the plaintiff should keep the premises in substantial repair, according to the terms of the then tenant's lease, and that he should have the benefit of all the repairs which that tenant was bound by his lease to perform.

The bill then set forth in considerable detail a narrative of certain disputes which had arisen between the parties as to the nature of the repairs to be done by the plaintiff, and the amount which he was to receive towards them from the outgoing tenant, with the particulars of certain communications between him and the plaintiff on the subject; and also stated, amongst other things, that the defendants, the trustees, had brought an action against the late tenant for non-performance of his repairs, and another against the plaintiff for the rent which had accrued due since he entered upon the farm; and it prayed specific performance of the agreement, and an injunction.

In answer to the several charges as to documents, the defendants, the trustees, admitted that the documents mentioned in the first schedule were in their possession, and that they related to the matters mentioned in the bill, or some of them. And one of the defendants, who was a solicitor, made a similar admission as to the documents in the second schedule, but added that they were letters which had passed between the defendant, the married woman, and himself as her solicitor, since the disputes in question had arisen, and in reference thereto, and he therefore submitted that they were privileged.

After the answers had been put in, the plaintiff amended the bill by striking out the prayer for the injunction, and all the statements in the body of the bill relating to the disputes and communications about repairs, &c., and to the actions, leaving nothing but what was necessary to sustain the prayer for specific performance; and upon the bill as so amended the Vice-Chancellor's order was made.

Mr. *James Parker* and Mr. *Hetherington*, for the appeal motion.

Mr. *Rolt*, contra.

On the question of privilege, Jones *v.* Pugh,[1] Stratford *v.* Hogan,[2] Flight *v.* Robinson,[3] were cited.

The Lord Chancellor having asked whether the memorandum of agreement was among the documents, and being answered in the negative, said: In the absence of authority, I am not disposed to lay down a rule which I think would lead to great inconvenience. A party files a bill stating a variety of circumstances, and requiring an answer as to documents relating to the matters therein mentioned. He then strikes out a great part, confining his bill to a portion only of what it before contained. On a motion of this kind, it is for the plaintiff to show that the documents relate to the contents of the bill as it stands when the motion is made; for he asks the court to act upon an admission in the answer, and there is no admission in this answer that any of the documents relate to the matters at present contained in the bill as amended. It is said that that is the defendant's fault, and that if any of the documents relate exclusively to matters which are expunged from the bill, he ought to have put in a further answer and to have so stated. But I think it is the plaintiff's fault. He might have moved before he amended the bill, or he might have required a further answer to his interrogatory in the amended bill; and he is not without remedy, for he may amend his bill again for that purpose. At present I have no means of ascertaining whether the documents refer to matters in the bill as it stands, or only to that part of it which has been struck out.

But, independently of this, there is another question of considerable importance, — how far the plaintiff was entitled to the production of documents which cannot be material to him, at least in this stage of the suit; for the bill as it stands makes no case as to repairs: all the plaintiff now asks is specific performance, and for that purpose he only wants the agreement which he has got, and which is not among those documents. But I say nothing about that, or about privilege; for I am not satisfied, on the admission in the answer, that the defendant has any documents in his possession relating to the case made by the present bill. *Order discharged.*

[1] 1 Phill. 96. [2] 2 B. & B. 164. [3] 8 Beav. 22.

GLOVER v. HALL AND ANOTHER.

BEFORE LORD COTTENHAM, C. JANUARY 20, 1848.

[*Reported in* 2 *Phillips*, 484.]

THIS was the renewal of a motion which had been refused by the Vice-Chancellor of England for production of certain deeds admitted by the answer of the defendant, Sir Benjamin Hall, to be in his possession, and particularly of two of them, dated respectively in March, 1804, and March, 1810.

The suit was instituted for the recovery of a messuage and certain premises called High Meadow, to which the plaintiff claimed to be equitably entitled for the residue of a term of ninety-nine years, created by the deed of March, 1804, and the legal estate in which was alleged to be in the defendant Jeffreys.

The case made by the bill was, that in the year 1804 Samuel Glover, the plaintiff's father, being seised in fee of an estate called Abercarne, of which High Meadow then formed part, executed the deed of 1804, by which he demised High Meadow to Matthew Jeffreys and John Jeffreys for ninety-nine years, at a pepper-corn rent, "in trust to suffer his wife, Phyllis Glover, and such person and persons and their executors and administrators as she should, in and by her last will and testament duly executed, give, devise, and bequeath the same to, to take to his, her, and their own use and benefit, the rents, issues, and profits thereof, for and during the said term of ninety-nine years, exclusively and notwithstanding her then present or any future husband, and not to be subject to the debts or contracts of any future husband she might afterwards marry, her receipt alone under her hand to be deemed and taken as a good discharge and discharges for the same."

That Samuel Glover died in 1809, having previously sold the Abercarne estate, subject as to High Meadow to the term of ninety-nine years, to the father of the defendant, Sir Benjamin Hall, and that by the deed of March, 1810, Phyllis Glover had for valuable consideration assigned her life-interest in that term to the same party; that she afterwards died in the year 1819, having by her will bequeathed the residue of the term to John and Matthew Jeffreys and her two sons, Joshua

Glover and Peter Brown Glover, in trust for the said Peter Brown Glover and the plaintiff his sister, in equal moieties, with cross-remainders between them in the event of either dying without children.

That, Phyllis Glover having omitted to appoint any executor of her will, her two sons took out administration to her estate with the will annexed, but that no proceedings were taken for the recovery of the premises comprised in the term, which were then in the possession of the defendant's father under the assignment of 1810, until Michaelmas term in the year 1839, when Peter Brown Glover, who had survived his brother Joshua, brought an action of ejectment upon the joint demise of himself and the plaintiff, and also on another joint demise of Matthew and John Jeffreys, against Sir Benjamin Hall, who had then succeeded his father in the possession of the estate, but in which action after delivery of the declaration no further proceedings were taken; and that Peter Brown Glover died in 1844, without children, whereupon the plaintiff became entitled to the whole interest in the premises for the residue of the term.

In reference to the deed of 1810, the bill, after stating the plaintiff's version of it, and suggesting a pretence that it was in fact an assignment of the whole residue of the term, and not merely of Phyllis Glover's life-interest therein, and that John and Matthew Jeffreys were both parties to and executed the same, charged the contrary to be true, and that though John and Matthew Jeffreys were named as parties to the deed, they expressly refused to execute it, and never had done so; and that so it would appear if the defendant would set forth when, where, and in whose presence and upon what occasion such assignment was executed by Matthew and John Jeffreys respectively, and by whom such execution was attested, and also the short and material contents of such deed of assignment, and particularly what interest in the premises was assigned or attempted to be assigned thereby. And, after suggesting a further pretence that the plaintiff's right, if any, was barred by the Statute of Limitations, the bill charged that it had been kept alive by the action which was brought within twenty years from the death of Phyllis Glover, but that at all events the plaintiff's right was not barred as to that moiety of the premises, the title to which accrued to her only on the death of her brother P. B. Glover, in 1844; and after further charging that the plaintiff could not prosecute the said action, or commence any other, as well by reason of the legal estate in the premises being outstanding in the defendant Jeffreys as by reason of the deed of 1804 being in the hands of the defendant Sir Benjamin Hall, it prayed that Sir B. Hall might be decreed to deliver possession of the premises to the plaintiff, or that she might be at liberty to use the name of the defendant Jeffreys in an action of ejectment, and that

Sir Benjamin Hall might be ordered to produce the deed of 1804 at the trial.

There was no personal representative of Phyllis Glover, a party to the suit; nor did the bill allege that her debts had all been paid, or that her personal representative had ever assented to the appointment in favor of the plaintiff and her late brother.

The defendant, Sir Benjamin Hall, by his answer, admitted that the deed of 1804 was to the effect stated in the bill, but denied any knowledge of the will of Phyllis Glover, or whether the plaintiff was her daughter, or the person alleged to be so designated in the will. And he rested his title on the deed of 1810, which he insisted was an assignment by Phyllis Glover and the two trustees of the deed of 1804, all of whom he said had duly executed it, of all the then residue of the term of ninety-nine years, and not merely of Phyllis Glover's life-interest therein; in confirmation of which he set forth a full abstract of the deed, purporting to be "an assignment and surrender of the premises in question, and of all the estate, right, title, interest, term, and terms of years, possibility, property, claim, and demand, both at law and in equity, of Matthew Jeffreys, John Jeffreys, and Phyllis Glover, or any of them, in, to, or out of the same, or any part thereof, unto Benjamin Hall, his executors, administrators, and assigns." After which there was a covenant by Phyllis Glover, for herself, her heirs, executors, and administrators, for further assurance by herself, her executors, administrators, or assigns, and all persons claiming or to claim under her, them, or any of them, or under Samuel Glover.

The answer submitted that under these circumstances the defendant was not bound to produce either of the deeds, stating, as to that of March, 1804, that it was one of his title-deeds, and that the plaintiff had no interest in it or in the premises therein comprised; and as to the deed of March, 1810, that it was his title-deed, and that it did not evidence any title of the plaintiff; and there was, at the conclusion of the answer, a general statement as to all the deeds production of which was sought, that they related to and evidenced the title of the defendant and his trustees to the property in question, and did not afford any evidence of any title in the plaintiff to the same or any part thereof. And the defendant insisted on the benefit of the Statute of Limitations as a bar to the whole of the plaintiff's demand, or at all events to the extent of that moiety of the premises to which, according to her own case, she became entitled in possession on the death of Phyllis Glover.

Mr. *Turner* and Mr. *Collins*, for the plaintiff. The deed of 1804 being the root of the plaintiff's alleged title, she is, by the ordinary rule, entitled to the production of it. Shaftesbury *v.* Arrowsmith.[1]

[1] 4 Ves. 66.

She has also a right to see the deed of 1810; for the main question in the cause is whether that deed does or does not amount to more than the conveyance of Phyllis Glover's life-interest. If the defendant had intended to protect it from production, he ought to have pledged his oath positively to its effect, instead of which he has set out an abstract of it. The plaintiff is, therefore, entitled to see whether that abstract correctly represents the purport of the deed or not. Latimer *v.* Neate.[1]

Mr. *Rolt* and Mr. *Goldsmid*, contra. If the rule now contended for on the authority of Latimer *v.* Neate were correct, the question so much agitated in Hardman *v.* Ellames,[2] as to the effect of an express reference to a document partially set out in an answer, would never have arisen. As to the deed of 1804, the plaintiff's interest in it depends on her being appointee under the alleged will of Mrs. Glover; but neither that will nor the identity of the plaintiff with the daughter who is said to be therein mentioned is admitted by the answer; and for any thing that appears the plaintiff may be a mere stranger to Mrs. Glover, and she is therefore not entitled to the production even of the deed of 1804. Adams *v.* Fisher.[3] It is true that in that case the plaintiff's title was not merely ignored, but denied by the answer; but ignorance is equivalent to denial. Smith *v.* Dowling.[4]

Mr. *Turner*, in reply.

The Lord Chancellor. The plaintiff's title, as set forth in the bill, to the property claimed is under the will of Phyllis Glover, who died in November, 1819, who, it is alleged, was entitled to a life-interest in a term of ninety-nine years in such property, with a general power of appointment by will, under a deed of demise executed in the year 1804 by Samuel Glover, the owner of the fee. The defendant's title is, that those through whom he claims purchased the fee from this Samuel Glover subject to the term, and that they afterwards purchased and took an assignment of the term from Phyllis Glover by a deed of 1810, which deed, however, the plaintiff alleges to have been only an assignment of her life-interest, and not of the whole interest in the term.

The plaintiff's title, therefore, being founded upon the deed of 1804, no subsequent transactions in which Samuel Glover may have engaged can affect that title. But all the deeds the production of which is required, except the deed creating the term and the deed of 1810, are acts of owners of the estate subsequent to the creation of the term, and cannot, therefore, constitute any part of the plaintiff's alleged title, and, therefore, according to the established rule, are not liable to be produced upon the plaintiff's application.

But it was said that the plaintiff had obtained a right to the produc-

[1] 4 Cl. & Fin. 570.
[2] 2 Myl. & K. 782.
[3] 8 Myl & Cr. 526.
[4] 10 Jur. 63.

tion of the deed of 1810 from the manner in which the defendant has referred to it in his answer; and the case of Latimer v. Neate,[1] and particularly what I am reported to have said in that case, was quoted in support of this proposition. And, certainly, if that case can be seriously quoted in support of that proposition, it is of importance that it should be better understood. It was a bill by a judgment creditor seeking payment of his debt out of property which the defendant had assigned to another, impeaching the assignments, but offering to pay what the assignee might have advanced upon the assignments. The pleadings showed that the assignments were only a mortgage security, so that the plaintiff established an interest in the documents; but the form of pleading was as follows: the bill addressed interrogatories (for the purpose of proving that the assignments were securities only) as to what the documents contained, which the defendant did not answer. Exceptions having been taken, the court held the defendant bound to answer, and allowed the exceptions; and, upon the further answer, the defendant set forth an abstract of the documents, professing, of course, to state truly what they contained; and the question arose upon the plaintiff's motion for production of the documents themselves, which the House of Lords held that the plaintiff was entitled to.

The observation I made in moving the judgment of the House on that case must be understood to have reference to the facts of the case, that is, to documents the contents of which the defendant was bound to disclose. Nor is that left to inference, for I first observe that the plaintiff's right to redeem the property comprised in the assignments was established, and that the defendant's liability to give discovery of the contents of the documents in his possession had been established by the order of the court upon the exceptions, and, therefore, that the plaintiff was not bound to be content with the defendant's statement of such contents, but was entitled to see the documents themselves; and I conclude in these words: "I think your Lordships may safely affirm the order of the court below on these two grounds, — first, that this is a case in which the plaintiff is not only seeking to redeem, but is seeking to have an instrument treated as a mortgage security, which the defendant has set up as an absolute title; and, secondly, because the defendant, having set out what he states as the contents of the deed, the respondent, under these circumstances, is entitled to see whether the abstract be or be not a correct abstract of those deeds of which he asks the production."

In that case there was an interest in the deeds established by the plaintiff, and a disclosure of their contents ordered by the court, and professed to be given by the defendant. In the present case the plain-

[1] 4 Cl. & Fin. 570.

tiff shows no interest in the deed, and the liability to a disclosure of the contents is denied and resisted, and has not been ordered. This case wants every circumstance which existed in that case upon which the judgment was founded.

Upon these grounds I think the judgment of the Vice-Chancellor right in refusing to order the production of any of the deeds subsequent to the deed of 1804 creating the term. This deed, however, does form part of the plaintiff's alleged title; it created the estate which she claims; and had the plaintiff connected herself with the estate of Phyllis Glover, I should have thought her entitled to a production of this deed; but there is not, upon this record, any ground for assuming that she is entitled to any interest which Phyllis Glover may herself have had. Her title is under the will of Phyllis Glover, as legatee of a term of years. No representative of Phyllis Glover is before the court, although the alleged property was assets for her debts, no assent to the alleged legacy stated, and no recognition of an enjoyment of the alleged legacy, and no admission of the will under which she claims, and the bill not filed until twenty-eight years after the alleged title accrued. It is not a case in which the defendant merely states that he is ignorant of facts or documents which constitute the alleged title of the plaintiff, but one in which the plaintiff has not alleged such a title as would entitle her, without more, to what she asks. This applies to all the documents, and is of itself sufficient to justify the order of the Vice-Chancellor. This motion must be refused with costs.

ATTORNEY-GENERAL *v.* THOMPSON.

BEFORE SIR JAMES WIGRAM, V. C. JANUARY 25, 29, AND 31, 1849.

[*Reported in* 8 *Hare*, 106.]

THE original information stated an indenture of feoffment of the 1st of October, 1735, made by Evan Treharn, of his part or share of the farm and lands called Penydarren, otherwise Ton y fald, containing the several closes therein named, to and to the use of John Williams, his heirs and assigns, and a lease, dated the 2d of October, 1735, made by John Williams, of the same premises, for a term of nine hundred and ninety-nine years, to the said Evan Treharn, reserving an annual rent of £3. The information then stated a devise by the will of John Williams, dated the 18th of November, 1735, of his undivided moiety of the farm and lands called Penydarren, otherwise Ton y fald, containing the several closes therein named, subject to the said lease, to trustees, upon trust for the Protestant dissenters of Merthyr Tydvil; and that in 1784 the person entitled to the residue of the term joined with the owner of the other moiety of the premises in demising the entirety for some long term for mining purposes; that the defendants Thompson and Forman had come into possession of the premises under such demise of 1784; that the said defendants, or those under whom they claimed, had procured to themselves an assignment of the residue of the said term of nine hundred and ninety-nine years in one moiety, and a conveyance of the other moiety; that the defendants had worked the mines under the lands contained in the demise of nine hundred and ninety-nine years, and had taken large quantities of minerals and ore therefrom; and the information prayed an injunction and account.

The defendants by their answer stated an indenture of feoffment of the 4th of June, 1728, whereby a moiety of Tyr Ton y fald (containing the parcels therein described) was conveyed to Evan Treharn, his heirs and assigns; but the defendants added, "that the parcels comprised and described in the said feoffment of the 4th of June, 1728, do not correspond either in quantity or description with the parcels comprised in the indenture of feoffment of the 1st of October, 1735, in the

said information set forth, as the same are therein described and set forth, although some of such last-mentioned parcels are the same in description but not in quantity as some of the parcels in the said indenture of feoffment of the 4th of June, 1728. But the defendants say they have never seen the indenture of feoffment of the 1st of October, 1735, or the indenture of lease of the 2d of October, 1735, in the said information set forth, nor is any mention or allusion whatever made to either of such last-mentioned instruments in the abstract of title, or in any of the deeds which were furnished to the parties under whom these defendants now claim to be entitled in fee-simple to one moiety of the hereditaments and premises comprised in the said feoffment of the 4th of June, 1728, upon their purchase thereof in the year 1801, as after mentioned; nor had these defendants any reason to believe or suspect, nor did they believe or suspect, or ever hear, till the year 1842, that there were such deeds as the feoffment of the 1st of October, 1735, and the indenture of lease of the 2d of October, 1735, in the said information mentioned."

The defendants stated certain mortgage deeds made by the heir-at-law of Evan Treharn in 1775, purporting to convey the premises in fee without any mention of the alleged deeds of 1735; and they also stated several demises of the undivided moieties of the said premises by such heir-at-law and by the owner of the other moiety in 1784, with power to work the mines, to persons who formed a partnership called the Penydarren Iron Company, and which partnership afterwards purchased the fee-simple of a moiety of Ton y fald, which was duly conveyed to them by indentures of lease and release dated the 20th and 21st of November, 1801, "by the same description of premises as the hereinbefore-stated description of the premises comprised in the said deed of feoffment of the 4th of June, 1728 (subject to the said lease of 1784), and save and except a lease of 1796 to the same partnership;" and also, "save and except a yearly rent of £3 issuing out of the said moiety of the premises due to the trustees for the time being of Yrusgorgy meeting-house in Merthyr Tydvil." The defendants said they believed that the payment of such £3 had not been made by the heirs of Evan Treharn in respect of the rent reserved by the alleged lease of the second of October, 1735; and that the deeds of 1801 first subjected the premises to the said payment: they admitted the payment of the £3 annually since 1801. The defendants, among other things, stated that it would appear from the leases and documents in their possession that some part of such land was divided, and the other undivided. The defendants claimed both moieties of the land in their possession under the demise of 1784; and under the said conveyance of November, 1801, they claimed the fee-

simple of the moiety formerly belonging to Evan Treharn, and they claimed to work the mines under such title. They denied that the alleged term of nine hundred and ninety-nine years had ever been assigned to them, or any person under whom they claimed; and they admitted the possession of the deeds of the 20th and 21st of November, 1801.

The information was then amended by charging that the defendants claimed under the alleged conveyance of the 20th and 21st of November, 1801; but that if any such conveyance was ever made, the lands to which the same applied were not in fact the lands comprised in the indentures of the 1st and 2d of October, 1735, and so it would appear if the defendants would set forth the full particulars and quantities of the lands as contained in the said alleged indentures of the 20th and 21st days of November, 1801.

The information charged that divers parcels of the lands which the said defendants admitted to be in their possession and occupation differed in quantity and description from, and were not identical with, the lands and premises contained in or intended to be conveyed by the said indentures of the 20th and 21st days of November, 1801; and that the said defendants were, in fact, in the possession and occupation of the lands contained in the said indentures of the 1st and 2d days of October, 1735, as well as of the lands alleged by them as aforesaid to have been conveyed by the said indentures of the 20th and 21st days of November, 1801.

The answer to the amended information denied that the defendants claimed the lands mentioned in the information under the deeds of November, 1801, save as their former answer had stated; and they insisted that, under the circumstances, and for the occasions herein and in such answer in that behalf set forth (to which they also craved leave to refer), they ought not to be compelled, and they therefore declined, to set forth fully and at large the description and quantities of the parcels of the lands and premises which the said indentures of the 20th and 21st days of November, 1801, purport "and effect" to convey. For they said (as they alleged the fact and truth was) that the aforesaid indentures of the 20th and 21st days of November, 1801, were their own title-deeds, and exclusively related to their own title to the lands and premises of which they were in possession, as in their said former answer mentioned; and did not, as they believed, form any part of the title of the charity in the said information mentioned to the premises comprised therein, and did not, as they believed, prove or tend to prove any of the allegations in the said amended information mentioned, any further or otherwise than as such allegations or any of them were or might be therein and in their former answer admitted to

be true. And the defendants denied it to be true that any part or parts of the lands and premises in their possession or occupation did to any extent differ in quantities or description from, or were or was in any respects in fact not identical with, the lands and premises described in the said indentures of the 20th and 21st days of November, 1801, and thereby purported to be conveyed.

On the motion for the production of the papers referred to in the schedule to the answer, the defendants resisted the production of their purchase-deeds of the 20th and 21st of November, 1801.

The *Solicitor-General*[1] and Mr. *Blunt*, for the motion. The admission of the relevancy of the documents is sufficient to entitle the informant to their production, unless the effect of that admission is taken away by showing a sufficient ground of protection. The assertion that the documents are evidences of the defendants' title, and that the defendants believe they will not support that of the plaintiffs, is not alone a protection. Harris *v.* Harris;[2] Bannatyne *v.* Leader.[3] The court will judge of their effect when the documents are produced. In this case the right of the plaintiffs to production is strengthened by the admission in the answer that the parcels described in the several deeds do to some extent at least correspond.

Mr. *Walker* and Mr. *Collins*, for the defendants, contended that there was no ground upon which the court would order the production of the title-deeds of the defendants. The parties did not claim under any common title. There was no identity shown to exist between the lands the reversion of which was claimed by the information and the lands in the possession of the defendants. The name of Evan Treharn, indeed, occurred in both titles, but it was mentioned as dealing with a different subject. A rent of £3 occurred in both titles; but the rent on the property to which the information referred was an incident of the reversion,—the rent on the property of the defendants was a rent-charge. This, in fact, was the case made by the information. The amended information charged that the lands comprised in the deeds of 1801 and those in the deeds of 1735 were not the same. The case, therefore, stood thus: the charity claimed some estate of which they said the defendants were in possession; and they said the defendants have deeds which relate to other lands, and ask that they may be ordered to produce the deeds not relating to the lands which they claim, but to other lands as to which they did not dispute the defendant's title. The application was to this extent unprecedented. If the informant might have been entitled to the production on the original information (which, in a case of adverse title, was denied), any pretence for such production was excluded by the amendment.

[1] Sir John Romilly.—Ed. [2] 4 Hare, 179. [3] 10 Sim. 230.

The VICE-CHANCELLOR. There is no doubt as to the principle by which this case must be governed. It is found in all the authorities, one of the last of which is the case of Glover v. Hall.[1] The plaintiff must show that he has an interest in the document the production of which he seeks. What is the meaning of the term "interest" thus applied? It is not interest in the nature of property. If the right were so limited, the production would be very rarely obtained. It is sufficient that he be so far interested in the document as to stand in need of its production for the legitimate purposes of the litigation in which he is engaged with the defendant, — for the purposes of the suit. He must show that it is or may be evidence which may prove, or lead to or assist in proving, his case at the hearing of the cause; and this interest he must make out from the answer of the defendant. It must be shown that the document is of a character that it will or may give a discovery of the case or a portion of the case, without proof of which the plaintiff cannot have a decree. The claim on behalf of the charity is to the rent of £3 a year, under the lease by Williams to Treharn. The defendants claim to hold the land under a conveyance from Treharn or persons claiming under him. Applying to that state of things the rule laid down in Bolton v. Corporation of Liverpool,[2] it is clear that none of the deeds in the possession of the defendants can prove the title of the charity to the rent under the demise to Treharn. No case, at least, is alleged to show that any such evidence can be found in the defendants' deeds. There are, however, two things to be proved in support of the information: first, that, under the demise of Williams, the charity is entitled to the £3 a year; and, secondly, that the defendants are in the possession of the lands out of which the £3 a year is to arise. If the deeds of 1801, under which the defendants say they have purchased the lands in their possession, will show the identity of the lands, they will prove one of the branches of the case which, in support of the information, it is necessary to establish. The defendants, it is true, deny the right of the charity to the £3 a year which is claimed, but that may be proved by other means; and I cannot, because that part of the case is at present not proved or admitted, refuse the plaintiff the discovery which he asks, to enable him to make out the other part of his case. It is not like the case of Adams v. Fisher,[3] in which the Lord Chancellor held that the plaintiff must show a title to the account before he was entitled to a production of documents relating to the items of the account; nor is it like the case of Dubless v. Flint,[4] in which a motion to bring into court money admitted by the defendant to be in his hands was refused, there being

[1] 2 Phill. 484–492.
[2] 1 Myl. & K. 88.
[3] 3 Myl. & Cr. 526.
[4] 4 Myl. & Cr. 502.

no admission of the plaintiff's title. The circumstance that the defendants ignore the title of the charity is not a reason for refusing to discover whether the lands comprised in their deeds are the lands out of which the rent which the charity claims is to issue.

The defendants then allege that the deeds of 1801 are their own title-deeds; but this is not a ground for refusing the production, so far as they may be necessary to establish the title alleged by the plaintiff. In many cases in which a bill is filed to impeach a deed under which the defendant claims, the plaintiff is entitled to move for the production of the deed. This has been done in cases where it has been alleged that something appears on the face of the deed itself which would tend to prove the case of the plaintiff. Kennedy *v.* Green.[1] But it has not been confined to such cases. Applications were made for the production of instruments forming the title of the defendants in the cases of Beckford *v.* Wildman,[2] Tyler *v.* Drayton,[3] Balch *v.* Symes,[4] Fencott *v.* Clarke,[5] Neate *v.* Latimer,[6] Pilkington *v.* Himsworth,[7] and Carter *v.* Goetze;[8] and in all these cases, I believe, the production was ordered. The court has not been precluded from making the order by the mere denial of the plaintiff's title, but has gone into the inquiry, — whether it did not appear by the answer that there was a question to be tried, upon which question the documents might furnish evidence on behalf of the plaintiff. There are certainly cases in which title-deeds are spoken of as if they were the subject of a particular privilege;[9] but I do not think that it has ever been decided that a ground must be laid for their production which does not apply to other documents.

January 31.

The VICE-CHANCELLOR. In this case I shall not recur at large to the points I observed upon at the close of the argument, relating to the principle by which my judgment must be guided. To one point only I think it right to recur, — I mean the distinction between cases of the class now before me, and cases such as Dubless *v.* Flint[10] and Adams *v.* Fisher,[11] and other like cases, in which the court has said that, as the plaintiff's title was not admitted, the court would not before the hearing make an order against the defendant, to which order the plaintiff would not be entitled unless he had the title which

[1] 6 Sim. 6. [2] 16 Ves. 438. [3] 2 Sim. & Stu. 309.
[4] T. & R. 87. [5] 6 Sim. 8.
[6] 2 Y. & C. 257; s. c. 4 Cl. & Fin. 570. [7] 1 Y. & C. 617.
[8] 2 Keen, 581.
[9] See Firkins *v.* Lowe, 13 Price, 198; Collins *v.* Gresley, 2 Y. & J. 491.
[10] 4 Myl. & Cr. 502. [11] 8 Myl. & Cr. 526.

he asserted. The object of the motion in this case is to obtain evidence (by means of discovery), by which evidence the plaintiff's title is to be proved at the hearing. To refuse a discovery because his title is not admitted would be to refuse it in the case in which it is wanted, and for which the rule of the court giving discovery to the plaintiff intended to provide. In Adams v. Fisher the plaintiff alleged that the defendant was an accounting party to the plaintiff's testator, in respect to his employment by the testator; and the plaintiff moved for the production of documents in the defendant's possession relating to matters of the alleged employment. The defendant denied his employment by the testator and his liability to account to the testator's estate. He said that the person who employed him, and to whom alone he was accountable, was a third person, A. B., who was the testator's agent, and was accountable to his estate; and the Lord Chancellor decided that, until the privity between the defendant and the testator's estate was established, it was premature to call for a production of documents which related exclusively to the items of the account. The same reasoning would not apply, if, as in Harris v. Harris [1] (cited at the bar), the contents of the documents had related to the fundamental point in the plaintiff's case, namely, his right to call for an account.

The only inconvenience which the decision in Adams v. Fisher would occasion to the plaintiff was some possible delay (see Rowe v. Teed [2]), and the possible loss of evidence by the death of the defendant, — an observation which applies less strongly to the production of documents than to the answer of a defendant upon exceptions in the common form. And therefore it was that I said during the argument that an unnecessary difficulty had been created on the part of the plaintiff, by moving for the production of the deed of 1801, instead of requiring the defendants, by exceptions to their answer, to set out the descriptions of the parcels contained in that deed.

It was said, indeed, that a motion for the production of documents in a case like the present is analogous in principle to exceptions to an answer, as being the process of the court for compelling the defendant to perfect his answer. This in some sense may be true, and ample authority for the position may be found in Lord Eldon's judgments; but the court (and with good practical reasons on its side) will in many cases compel a defendant to answer direct questions, the answer to which the court may be less ready to allow a plaintiff to seek by ransacking the papers of his opponent.

I have read the pleadings in this case, and I believe I state the case with sufficient accuracy for the present purpose by saying that the

[1] 4 Hare, 179. [2] 15 Ves. 372.

Attorney-General, by the original and amended information, represents the charity to be entitled in fee-simple, under the will of John Williams, to an undivided moiety of the lands of Penydarren, otherwise Ton y fald, subject to a term of nine hundred and ninety-nine years under a lease dated the 2d of October, 1735; upon which lease was reserved an annual rent of £3. The information treats the defendants as in lawful possession of the property derivatively under the lease of the 2d of October, 1735, and complains of their working the mines, which, as lessees for years, they could not lawfully do, and asks relief accordingly. The defendants ignore the plaintiff's case altogether, and claim to be entitled to the entirety of the property of which they are in possession under two different titles, applicable to the two different moieties of the entire estate. The title to one moiety commences in 1728, in a conveyance to Evan Treharn, in fee, of one moiety of Penydarren, otherwise Ton y fald. In November, 1801, the defendants, or those under whom they claim, purchased of parties claiming under Evan Treharn one moiety of Penydarren, otherwise Ton y fald, subject to an annual payment of £3, issuing out of the moiety thereby bargained and sold, due to the trustees for the time being of a certain meeting-house in Merthyr Tydvil. They say that the number of closes, and the quantity of land, a moiety of which they purchased, do not correspond with those stated in the information to be contained in a certain deed of feoffment of the 1st of October, 1735, which is the root of the title of Williams, the plaintiff's testator; but they admit a correspondence or similarity between some of the parcels in the deeds of 1728 and 1735, as the latter are stated in the information. They say the deed of November, 1801, is their title-deed; that it shows their title, and not that of the plaintiff, and that they are not bound to produce it. The other moiety was purchased by the defendants under one Richards in 1784, but no question upon this arose. All that is now asked by the motion is a production of the deed of November, 1801.

A question arose upon the amendments, which I will presently notice. At present I will suppose that no difference has been made in the question by the amendments or the answer to them.

The defendants are, *prima facie*, right in their argument. Their title-deeds cannot, in a case like this, help to prove the plaintiff's case. In fact, they are antagonistic. A main question, and one most prominent upon the pleadings, is the identity of parcels, and that the plaintiff will be bound to prove at the hearing, and is, therefore, *prima facie*, entitled to discovery from the defendants, not excluding the conveyance of 1801, if that will prove the identity of the parcels. The plaintiff may be able to prove the deed of October, 1735, and the will of Williams; but that will not entitle him to a decree at the

hearing without proof as to the identity; and that which is necessary to perfect his right to a decree he is entitled to now in the form of discovery.

Admitting, then, the validity of the defendants' objection in the first instance, the question is, whether the admissions in the answer do not show that the plaintiff has an interest in the deed for the purpose I have referred to? I think that the answer must be given in the affirmative. The persons under whom both parties claim (the Treharns); the general name of the property, Penydarren, otherwise Ton y fald; the division of that into moieties; the correspondence or similarity of the names in some of the parcels; and the £3 per annum applicable to each, — appear to me conclusively to show that the contents of that document must be material as evidence with respect to the identity of the parcels.

But it was argued that the bill had been amended since the answer, and that the admissions in the answer to the original bill were not to be taken as answers to the matters in the amended bill. I will not deny that a case might well arise — indeed, I have known several — in which it would be unjust to treat an answer to an original bill as an admission of matter contained in an amended bill. One remarkable case occurred in this court, where the bill was amended, making no alteration except in the dates of certain deeds. The answer to the original bill was the admission of the existence of the documents in the bill mentioned, which, of course, was not to be taken as an admission in the case of the amended bill. The case, as I have said, may occur, but I have not been able to discover any such case in these pleadings. The defendants have raised no such point by their answer, nor has it been argued that any thing which appears on that answer to the amended bill alters the question now before me.

But it was further said, and this struck me very much at the time, that the grounds upon which I have intimated that the motion might succeed were excluded by the amendments; my argument being that the deed of 1801 might prove the identity of the parcels in the deed of the 1st of October, 1735, with those in the possession of the defendants, whereas it was said that the amended information expressly charges that the parcels in the deed of November, 1801, are not the same with those in the deed of October, 1735. I cannot understand why the plaintiffs should have embarrassed the case by introducing the amendment which has given rise to this argument. But without deciding what the effect of that amendment is, I think, adverting to the object and frame of the information, that the amended charge does not raise a material issue in the cause. The issue is, whether the parcels are identical, and not whether they appear to be so by the

deeds of 1801, or any other deed in particular. If at the hearing of the cause the deed of 1801 should be produced, and the identity of the parcels should thereby appear, it could not be successfully argued that the plaintiff was stopped from using the deed as evidence by reason only of the charge in question; and the admissions in the answer respecting the parcels in that deed, and their important bearing upon the question of identity, appear to me to give the plaintiff an interest in it for the purpose of discovery, notwithstanding the charge in question, — which, after all, is a mere charge as to the effect in evidence of a document the contents of which are not known to the plaintiff.

It was argued by Mr. Collins that the information stated an imperfect title. I think that that cannot be urged now as a reason for not giving discovery material to the case which the plaintiff relies upon. That, in effect, would be to hold that when the case comes on upon exceptions, or on a motion of this kind, the defendants may show the bill is demurrable, and that, therefore, the plaintiff is not entitled to the relief which he asks. I thought one of the new orders had enabled a defendant to do that,[1] but the Lord Chancellor has expressed a different opinion; and upon that point the rule which he has laid down must govern the present case.

The deed of November, 1801, must be produced. The form of the order should be that the defendants are to produce the documents for the plaintiff's inspection, but with liberty to conceal their contents, except what relates to the parcels.

[1] See Kaye & Wall, 4 Hare, 288.

M'INTOSH v. THE GREAT WESTERN RAILWAY COMPANY.

BEFORE LORD COTTENHAM, C. FEBRUARY 9, 1849.

[*Reported in* 1 *Macnaghten & Gordon*, 78.]

THIS was a motion to vary an order of the Vice-Chancellor Knight Bruce, by which his Honor permitted certain documents to be exempted from production, under the following circumstances: —

The object of the bill was to obtain from the defendants, the company, their engineer, and secretary, discovery whereby to substantiate the claim of the plaintiff in an action brought by him against the company. The defendants commenced their answer by saying that, "save as herein, and in and by the certificates, reports, correspondence, books, documents, papers, and writings which are mentioned and comprised in the schedule hereunto annexed, and which defendants are willing to produce as part of their answer in the same manner as if the same had been set forth at length, is mentioned and appears, they are unable to make any further or better answer to all or any of the matters in the bill mentioned or inquired after." In answer to various interrogatories, the defendants pleaded ignorance, "save as appears by the documents in the schedule." In answer to the general charge as to their possession of documents, the defendants, the company, said that "they have in their possession or power the several documents, papers, and writings mentioned and set forth in the schedule hereunto annexed, and which relate, as to some of them wholly, and as to the rest of them in part, to the matters and things in the said bill mentioned, *and which* they are ready and willing to produce (except as hereinafter mentioned);" they then proceeded to say that "all correspondence or copies of any correspondence, or other communications or copies of communications, in writing, passing between the defendants or their respective secretaries, clerks, or agents, or any or either of them, on the one hand, and their respective solicitors or clerks of their solicitors, or any or either of them, on the other hand, are privileged communications, and that the defendants, the company, ought not to be compelled to produce the same." On the usual motion for production,

the company relied upon this passage in their answer, as affording grounds for exempting the last-mentioned correspondence. There was also an affidavit by the solicitor to the company, that the letters referred to in the schedule related exclusively to other matters, and had passed between the company and their solicitors. Under these circumstances, the Vice-Chancellor, as to the letters, ordered the motion to stand over.

Mr. *Russell* and Mr. *Bazalgette*, in support of the appeal motion, relied upon the authority of Hardman *v.* Ellames.[1] The whole frame of the answer is based on the assumption that all the documents in the schedule are an essential part of it; the words of reference incorporate the letters in question with the answer, so as to form a substantial part of it; and the plaintiff is entitled to see every part of it. They also referred to White *v.* Williams.[2] The submission at the end of the answer, as to the letters being privileged communications, is a mere mistake in law, and cannot affect the rule so distinctly enunciated in the case of Hardman *v.* Ellames.

Mr. *Bacon* and Mr. *Stevens*, contra, argued that the case was distinguishable from Hardman *v.* Ellames, which only decided that if the defendant referred to documents in his schedule, the allegation that they relate exclusively to his own title, and in no way support that of the plaintiff, will not exempt them from production: that the present, however, was a case of confidential communications, which have always been protected where the privilege has been claimed. They contended further that, by the strict grammatical construction of the sentence of their answer to the general charge of documents in their possession, the defendants were entitled to separate the letters in question from the general mass of documents in their schedule, insisting that the words "and which" referred only to the latter clause of the sentence; and that such of the documents as were within the privilege asserted in the subsequent passage in the answer ought to be protected. They urged also that at most it was a mere slip, and that the plaintiff ought not to be permitted to avail himself of an inadvertency so manifest and so oppressive in its consequences. They added that the Vice-Chancellor had not decided against the plaintiff's right, having only, with reference to the particular letters, ordered the motion to stand over, while, in other respects, it had been granted.

Mr. *Russell* was not heard in reply.

The Lord Chancellor. The first question is, what is the construction of the sentence? and I must say, that upon that it is impossible to entertain any doubt. The defendants are called upon to make a certain discovery. The way in which they deal with that discovery

[1] 2 Myl. & K. 745. [2] 8 Ves. 193.

is not to answer it according to each question that is asked, but they protect themselves from that necessity, or endeavor to do so, by setting out in the schedule a long enumeration of various documents, and then saying "save as herein, and by the certificates, reports, correspondence, books, documents, papers, and writings, which are mentioned and comprised in the schedule hereto annexed, and which the defendants are willing to produce as part of their answer," &c. It is said that offer to produce, that willingness to produce, does not refer to all the papers and documents in the answer. It is to be observed that the word "which" is twice used: the first time it is used is after the enumeration of the documents which are mentioned and comprised in the schedule, and there it clearly means all that are comprised in the schedule. Then come the very next two words, — "and which." Do not they refer to the same subject-matter as the first "which" refers to, namely, all papers and writings set out in the schedule? It is impossible to suggest any other construction that would at all carry out the words that are used. It is quite clear that they have reference to all the documents set out in the schedule; for the defendant says, "save and except papers and writings which are set out in the schedule, and which," he says, "I am willing to produce as if they had formed part of this my answer." The question then is, whether that statement does not make those documents a part of the answer within the meaning of the decision in Hardman v. Ellames. I understand that case is not reported as heard at the Rolls; but I have a fresh recollection of it, and have had frequent occasions to refer to it. According to my recollection, I proceeded upon this ground: I said, if a party refers to a document and sets out a part of the document and then refers to it, he cannot afterwards tell the plaintiff that he shall not see the document, because the plaintiff is not bound to take the defendant's representation of the document. If the defendant uses it for any purpose, he must enable the plaintiff to see that it is used for a proper purpose, or whether it is not more beneficial to the plaintiff than the defendant thinks proper to admit. Now, if the defendant had set out any one of those letters, with respect to which privilege is claimed, and had said, except so far as that document gave him information he could not answer the question asked, I cannot say that the plaintiff would not have a right to see that document, which the defendant himself says contains all the information he possesses upon the particular subject. But he has said so in the gross as to all these documents in such a manner as to put it beyond doubt what he meant. If he did not mean that, he meant nothing, because to set out by a reference to a number of documents, which the plaintiff is not to see, and to say that, except so far as those documents contain the

information required, he cannot set forth, is virtually saying, I shall not answer the question at all. The defendant is bound to give the information; he refers to all the documents in the answer for the information that the plaintiff requires, and submits to produce them; he adopts his own course of answering, and, having done so, he cannot withdraw from that course. It may, no doubt, have occurred from inadvertence in the expressions used, and that the defendant meant all along, and intended, to protect himself from producing those which are called confidential communications. All that may have been intended; and, in claiming the privilege at the end of the answer, the general reference contained in the early part of the answer may not have been adverted to. If I find, however, in the body of the answer, a statement by the defendant that he cannot answer except by reference to certain documents which he refers to as part of his answer, and offers to produce, having said that, he loses all pretence for withholding that information from the plaintiff, because he himself has elected to adopt that mode of communication for giving that information which the plaintiff is entitled to receive from him. That is exactly Hardman *v.* Ellames. I cannot possibly distinguish the one case from the other. In both there was a reference to documents as part of the answer, and an offer to produce. In both, circumstances existed which, if it had not been for the general reference making the documents part of the answer, would have protected the defendant from producing them. In Hardman *v.* Ellames the question arose from there being a document which only went to prove the defendant's title, and would not aid the plaintiff in proving his own. Here, it is said, there were confidential communications passing between the solicitor and the client. Now, suppose the defendant had copied a part of one letter could he refuse to produce it, after referring to it as part of his answer in order to show that what he states in his answer is true? Of course he could not. He could not first say, I will show you something that is a privileged communication, and then say, I have told you something which I was not bound to tell you, the communication being privileged, but I will give you no more information about it; I will let you know as much of it as I like, without enabling you to ascertain whether the account I give of it is true, or whether it may not contain matter which I have thought proper to withhold. What has been done here comes to the same thing. The defendant has not set out any part of the documents, but has referred to the whole as the only documents which contain any information. These documents must, therefore, be produced. No doubt it puts the defendants in a situation which they would not have been put in if a different course had been pursued: it compels them to produce documents which are called

privileged; but it is a course they have brought upon themselves, and from which they cannot withdraw. The Vice-Chancellor, as I understand, never decided against the plaintiff's right, but he did that in effect. The object of the application being for the production of all the documents, he ordered the motion to stand over as to these particular documents. Though this was not deciding against the plaintiff by a refusal of that which he asked, yet the plaintiff had a right to complain, because the Vice-Chancellor might refuse to decide upon the motion for ever. An order that the motion should stand over might oe of the same effect as refusing it. If, however, the plaintiff is right in his contest, he is entitled to see these documents which are not produced, and which the regular practice compels. Those that are not produced are those as to which the plaintiff has a right to complain, and that is the only reason why I asked whether the Vice-Chancellor refused the motion or not, so that I might have the satisfaction of knowing that, in making this order, I do not act contrary to the opinion expressed in the court below.

PEILE *v.* STODDART.

BEFORE LORD COTTENHAM, C. APRIL 20, 1849.

[*Reported in* 1 *Macnaghten & Gordon*, 192.]

THIS was a motion by the defendant to discharge or vary an order made by the Vice-Chancellor of England on the 14th March, 1849, for the production of certain documents admitted by answer to be in the possession of the defendent; the defendant, however, contending that such admission was so qualified as to afford grounds for exempting them from production.

The bill was one of discovery in aid of the plaintiff's defence to an action at law, in assumpsit, to recover damages for the breach of a promise in discontinuing the payment of an annuity within the term of seven years, for which period the plaintiff in equity had, as the plaintiff at law alleged, contracted for its payment.

In answer to the usual charge as to documents, the defendant stated as follows: "This defendant says he has now in his possession or power, &c., and several letters, papers, and writings relating to the matters in the bill mentioned, or some of them; and he has, in the schedule hereto, which he prays may be taken as part of this his answer, set forth a list or schedule of all the said letters, papers, and writings; but he denies that thereby or otherwise, if the same were produced, the truth of the matters in the said bill mentioned, or any of them, would appear further or otherwise than as the same is hereinbefore admitted. And this defendant says that such of the said letters, papers, and writings as are set forth in the first part of the said schedule are of great importance to the claim made by this defendant in his said action, and are or contain the evidence on which this defendant is advised and intends mainly to rely at the trial of the said action; and the said letters, papers, and writings, as well those in the second and third parts as those in the first part of the said schedule or any of them, do not nor does, as defendant is also advised and verily believes, contain any evidence whatever in support of or tending to support the plaintiff's pleas in the said action, or any of such pleas; and are not, nor is, in any manner material to the plaintiff's case. And this defend-

ant says that such of the said letters, papers, and writings as are set forth in the second part of the said schedule were, and are, private and confidential communications between this defendant and his solicitors or legal advisers, in the ordinary course of professional business; and all and every of them relate to the matters in dispute between this defendant and the plaintiff in the said action; and he says that the plaintiff has not, as this defendant is advised and verily believes, any right or title to the production of, or any interest whatever in, the letters, papers, and writings in the said schedule mentioned, or any of them."

Mr. *Stuart* and Mr. *Busk*, in support of the appeal motion. The order of the Vice-Chancellor is founded on the authority of Bannatyne *v.* Leader;[1] but, even if that authority is unquestioned, this case is distinguishable, for here the bill is merely for discovery, but there it was for relief also. Here the defendant says that he "is advised and verily believes," and it is submitted that no allegation can be stronger than that which asserts a belief, nor can the effect of that belief be impaired because it happens to be corroborated by the advice of another. The terms in which the defendant swears to his answer support this conclusion, for he swears that what is contained in his answer, as far as concerns his own act and deed, is true of his own knowledge; and that what relates to the act and deed of any other person or persons he believes to be true.[2] Besides, some of these letters were written by the plaintiff in equity to the plaintiff at law, and others from other persons to the plaintiff at law; as to neither of these can production be enforced. There is no allegation in the bill that the documents are material to the plaintiff's title, or that the defendant holds them in a fiduciary character, or that the plaintiff and defendant have a common interest Bolton *v.* Corporation of Liverpool.[3]

Mr. *Follett*, contra. A great many of the letters in question are from the defendant in equity to the plaintiff in equity: how can they relate exclusively to the support of the title of the plaintiff at law? There is nothing to take these letters out of the general rule, in the mere fact that some of the letters were from the plaintiff in equity to the defendant in equity. The cases of Storey *v.* Lord John George Lennox[4] and Smith *v.* The Duke of Beaufort[5] were both, like this, bills of discovery. In order to be entitled to protection, there must be a distinct and positive averment that the documents do not relate to the title of the plaintiff: Bannatyne *v.* Leader;[6] otherwise a defend-

[1] 10 Sim. 230.
[2] See Hinde's Ch. Pr. 235.
[3] 1 Myl. & K. 88.
[4] 1 Myl. & Cr. 525.
[5] 1 Hare, 507; 1 Phil. 209.
[6] 10 Sim. 230.

ant might apply to an incompetent party, to whose advice he might attribute his belief.

Without calling for a reply,

The LORD CHANCELLOR. With regard to the letters of the plaintiff in equity there can be no doubt; and the order, as it stands, includes these: it is impossible that it can be sustained as to such letters. The plaintiff in equity says, "I desire, for the purposes of my defence, to see the letters which I wrote to you;" but it is obvious that he can have no such right, for the plaintiff at law must prove his contract before these letters can be material to the case of the defendant (the plaintiff in equity). It is true they may relate to matters mentioned in the bill; but the question is, whether they refer to the contract, which is the sole point at issue in the cause; and there is no allegation in the bill that they do. The discovery must have reference only to the subject at issue in the court of law. There being nothing on the face of the documents themselves to show that they do relate to the contract, and there being no charge in the bill to substantiate such a position, I am bound to give effect to the objection of the defendant that all the documents for which he claims exemption relate only to his own title.

With respect to the terms in which the protection is claimed, the defendant does not say, "I am advised, and therefore I believe;" but he swears as to his belief. He cannot be supposed to qualify his averment of belief by this mode of answering; and I am of opinion that it is a more complete and effectual denial than any mere statement of the irrelevancy of the documents.

The order, therefore, must be discharged, so far as relates to the production of the letters or documents with respect to which the exemption is claimed.

THE ATTORNEY-GENERAL *v.* THE CORPORATION OF LONDON.

BEFORE LORD LANGDALE, M. R. FEBRUARY 21, 22, 24, AND 26, AND APRIL 4, 1849.

[*Reported in* 12 *Beavan*, 8.]

BEFORE LORD COTTENHAM, C. DECEMBER 8, 13, 14, AND 17, 1849.

[*Reported in* 2 *Macnaghten & Gordon*, 247.]

THIS case related principally to the right of the Corporation of the City of London to the soil and bed of the river Thames within certain limits.

The demurrer having been overruled,[1] and the decision being affirmed by the House of Lords,[2] the defendants put in their answer, which it was now alleged was insufficient. It is necessary to restate the facts as concisely as possible.

The information insisted on the right of the Crown, by royal prerogative, to the ground and soil of the river Thames, of which river it alleged the Corporation of London had for a long period, "either by prescription or under some grant from the Crown," held the office of bailiff or conservator, with the duty to see to the navigation, prevent obstructions and nuisances, and regulate the fishing thereof; but that they did not, by virtue of such office, acquire any estate or interest in the ground and soil of the bed or shore of the river.

That the corporation had lately claimed to be seised of the freehold of the ground, bed, and soil of the river, and had assumed to exercise acts of ownership which were beyond their power as bailiff and conservator.

The information then stated particular instances in which the corporation had, for a pecuniary consideration, granted licenses to embank the river between the high and low water mark, to the detriment of the navigation.

It contained the following five charges, which gave rise to five exceptions, and which, with the corresponding portions of the answer

[1] 8 Beav. 270. [2] 1 H. Lds. Cas. 440.

alleged to be insufficient, for convenience, are here numbered. It charged (contrary to what was stated to be pretended by the corporation), —

1. That no grant had been made, by charter or letters-patent by Her Majesty's predecessors, of the soil and bed of the river to the corporation;

2. That in no charter had any immemorial right of the corporation to the ownership of the soil, bed, and shore of the river, as arising from a previous grant, been recognized or confirmed;

3. That a certain charter of 23 Hen. 6 was of no force to convey to the corporation the soil, bed, and shores, and that, if the language was sufficient, it had been revoked;

4. It stated that the corporation pretended that their right to the freehold of the soil was founded on immemorial usage, and that it was evidenced by acts of ownership exercised by them, and by various deeds, matters, and things from time immemorial; but the information charged that no sufficient acts of ownership, deeds, matters, or things could be shown as evidence of such immemorial usage.

5. It also charged that the defendants had in their possession some charters, letters-patent, &c., relating to the matters aforesaid, whereby the truth of the several matters thereinbefore stated would appear.

The information contained interrogatories corresponding with these statements, in the usual form.

The corporation, by their answer, stated that they were a corporation by prescription; and that they had, from time immemorial, "been seised and possessed of and well entitled unto, and been in the actual uninterrupted possession of, by the exercise of acts of ownership over, the bed and soil of the river Thames, and the banks and shores thereof, between high and low water mark;" and had, "for all the time aforesaid, been in the actual and exclusive exercise and enjoyment of all such rights and powers, as belonged to, and were capable of being exercised and enjoyed by, the owner of the legal estate and interest in the bed and soil of the said river," within the limits in question; and they claimed the benefit of the *Nullum Tempus* Act.[1]

They denied the right of the Crown, and admitted that from all time the corporation had, by the mayor, "held the office of bailiff and the conservancy of the river Thames," with the duties stated, which office was distinct from their ownership. And they submitted that their rights, &c., as bailiff were distinct from, but conveniently exercisable and compatible with, the rights, &c., as owners of the freehold of the bed, shore, and soil; for they submitted that the corporation, as bailiff and conservators, were enabled to exercise the

[1] 9 Geo. 3, c. 16.

prerogative, powers, &c., of the Crown over the river, "and which, but for such grant, would have remained vested in" the Crown.

They admitted the several grants made by them as owners of the freehold, and not as conservators, and that they had received considerable sums of money for fines and rents; but they denied the embankments were a nuisance or injury to the navigation.

They claimed the benefit of the Prescription Act of 2 & 3 Will. 4.[1]

And, as evidence of acknowledgment on the part of the Crown of their right, they stated that, in the reign of Queen Elizabeth, the Lord Treasurer Burleigh expressly stated "that the Thames and the conservation thereof were not only given to the city of London, but, by special suit, the king gave therewith all the ground and soil under the same. Whereupon, if any that hath a house or land adjoining do make a stand, stairs, or such like, they pay forthwith a rent to the city of London, how high soever they be above the low-water mark."

They stated as further evidence that the Commissioners of the Navy, in 1788, had obtained a grant from the corporation of permission to make an embankment, and that the Trinity House in 1793, and the Victualling Board in 1793, had obtained leave to drive some piles into the bed of the river.

They said their title had been undisputed for two centuries, and that the right claimed was a pure legal right; that this court had no jurisdiction to determine it; and that the Attorney-General ought to appeal for redress to a court of common law or to the Court of Exchequer sitting as a court of revenue; and they claimed the benefit of the 21 James 1, c. 14.

1. And they submitted that to compel the defendants to discover whether any charter or letters-patent of the Crown contained any grant of the ground, soil, or bed of the river, or to set forth under what charter, &c., they claimed the freehold, would be to violate the spirit and intention of that statute,[2] and a subversion of the common-law right and principle, that the claimant of an estate of freehold shall recover by the strength of his own title, and shall have no right to a discovery of the title by which such estate is held.

2. They submitted and insisted, for the reasons aforesaid, that they were not bound, and ought not to be compelled to answer and set forth, whether it is not true that in no charter or charters granted to the city of London by any of Her Majesty's predecessors has any immemorial right of the said mayor and commonalty and citizens of the ownership of the said soil, bed, and shores of the said river, as arising from some previous grant as in the said information mentioned, been recognized and confirmed, or how the defendants make out the con-

[1] Chap. 71. [2] 21 James 1, c. 14.

trary, or by what charters or letters-patent or other documents the defendants, the mayor and commonalty and citizens of the said city of London, maintain that the said right is recognized and confirmed.

3. Or whether it is not true that the charters or letters-patent of his late Majesty King Henry VI., in the said information mentioned, is or are of no force and effect to pass or convey to the said mayor and commonalty and citizens the said soil, bed, and shores of the said river, or how the defendants make out the contrary; or whether it is not true that such charters or letters-patent have or has been subsequently revoked, rescinded, or annulled, or how the defendants make out the contrary.

4. Or whether it is not true that no sufficient acts of ownership on the part of the said mayor and commonalty and citizens, or other deeds, matters, or things, can be shown, as evidence of such immemorial usage as that set up by the defendants, the mayor and commonalty and citizens of the said city of London, or how the defendants make out the contrary; and they claimed the same benefit, as to so much of the said information as they thereby submitted they were not bound to answer, as though they had pleaded or demurred thereto.

5. They admitted that they had in their possession certain deeds, charters, letters-patent, &c., relating to and touching and concerning the said right and title of the defendants to the freehold of the bed and soil of the said river Thames, and the enjoyments thereof, all which several deeds, &c., "evidenced or showed, or tended to evidence and show, such right or title of the defendants as aforesaid," and all which "formed material parts of the evidence possessed by the defendants of their aforesaid right and title, and all which were intended to be made use of and given in evidence by the defendants in support of their said right and title, in this cause, and none of which several charters, &c., did, as the defendants were advised and believed, evidence, or tend to show or prove the pretended or alleged right of the Crown set up in the information; nor would the informant derive any proof in support of his case from the production of such charters, deeds, instruments, entries, or other documents, or any or either of them." But the defendants said that they could not specify or describe such deeds, charters, &c., or any or either of them, in any list or schedule without, as they were advised and believed, disclosing the nature and character of the evidence on which they intended to rely as proof of their aforesaid right and title. And, therefore, under the circumstances therein stated, the defendants submitted and insisted that they were not bound, and ought not to be compelled, to set forth a list or schedule of such deeds, instruments, charters, &c.

They admitted the possession of other documents, &c., "relating to the matters in the information mentioned other than the title of the defendants to the bed and soil of the river Thames," a list of which they set forth in the schedule, and, save as aforesaid, they denied, &c.

To this answer the Attorney-General took five exceptions to the five portions to which, for convenience, numbers have been prefixed.

The Master allowed all these exceptions, and they were now brought before the consideration of the court, upon exceptions to the Master's report.

Mr. *Bethell* and Mr. *Randell*, for the defendants. The corporation have two distinct rights: first, that of conservators, to protect the navigation for the public and prevent nuisance, as to which no point as to title can arise; secondly, they set up a prescriptive immemorial title[1] to the bed and soil, and they appeal to various acts of ownership and to repeated acknowledgments and recognitions of that right by the Crown itself. When the proper time arrives they must make out that title; but, until the hearing, the informant has no right, by alleging that the deeds will not make out the defendants' right, to have a discovery of the title or of the defendants' evidence.

The Attorney-General, like any other suitor, is entitled to all the discovery which is necessary to make out his own title; but he has no right to compel a defendant to state his title, or, by anticipation, the evidence on which the defendant intends to support it. A plaintiff must succeed by the strength of his own title, and is not, by a mere allegation of right, to compel his adversary to expose his title, and thus enable persons to pick holes in it. The rule is thus stated by Lord Brougham in Bolton *v.* The Corporation of Liverpool:[2] "I take the principle to be this, — a party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it, by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. Thus an heir-at-law cannot in that character call for the general inspection of deeds in the possession of a devisee." Again, in Glover *v.* Hall,[3] production was refused where the plaintiff showed, upon the answer, no interest in the deeds, and the liability to a disclosure of the contents was denied and resisted.

The answer states distinctly that the several deeds, &c., evidence the right of the defendants, and do not show the right of the Crown.

[1] Co. Litt. 115 *a*.

[2] 1 Myl. & K. 91; and see s. c. 3 Sim. 490.

[3] 2 Phillips, 484.

The common-law right of the Crown requires no discovery or evidence to prove it, nor is it alleged to be necessary; yet the Attorney-General says, "Show me what is the nature of your title, and the deeds by which it is supported." This is contrary to the law of the court. The objection to make a discovery of the defendant's title may be made by answer as well as by plea. Bellwood *v.* Wetherell,[1] Buden *v.* Dore,[2] where Lord Hardwicke "allowed the exception to the report: for that you cannot come by a fishing bill in this court, and pray a discovery of the deeds and writings of defendant's title. If, indeed (he observed), there was any charge in the bill, general or special, that defendant had in his power deeds and writings of plaintiff's title, an answer must be given thereto."[3] . . .

Sir *J. Romilly* (Solicitor-General), Mr. *Turner*, and Mr. *Maule*, for the Crown.

Treating this as a question between subject and subject, and independently of the prerogative right of the Crown, the answer is insufficient in all the points excepted to. A defendant is bound to state, in a definite and distinct manner, the case on which he intends to rely, in order that his adversary may know what it is necessary for him to meet and prove at the hearing. In other words, he must plead issuably. The rule as to certainty is equally strict upon a defendant as on a plaintiff; and the title of the latter must be plainly averred on the record. Wormald *v.* De Lisle;[4] Balls *v.* Margrave.[5] It is insufficient for a defendant to say, by his answer, "I claim the property, but I will not, until the hearing, give you any information as to the nature of my claim." The rule as to production of title-deeds has no application to questions as to the obligation of a defendant to state the nature of the title insisted on by him.

Lord Redesdale[6] states that an answer is required to obtain an admission of the case made by the bill, a discovery of the points in the plaintiff's case controverted by the defendant, "and a discovery of the case on which the defendant relies, and of the manner in which he means to support it."

And the Vice-Chancellor Wigram, in commenting on this passage, observes: "The first of these propositions, that a plaintiff is entitled to a discovery of the case on which the defendant relies, that is, that the plaintiff is entitled to know what the case is, admits of no doubt. The common rules of pleading make it necessary that the defendant should so state his case, that the plaintiff may know with certainty what case he has to meet; and, in the strict observance of those

[1] 1 Y. & Col. (Exch.) 211. [2] 2 Ves. Sen. 445.
[3] The parts omitted are foreign to the subject of discovery. — Ed.
[4] 8 Beav. 18. [5] Ibid. 284. [6] P. 9, 4th ed.

rules, a plaintiff is secure against surprise."[1] Here the defendants have left in uncertainty what title it is they rely on: they are bound to answer the inquiries, and distinctly state it.

2. But there exists between the Crown and the corporation such a relation as to place the latter under an obligation to furnish the required discovery; the Crown having, by its prerogative, the right of property and ownership of the soil of the river Thames, between high water and low water mark,[2] has made a grant to the city of London of the conservancy[3] for the protection of the navigation and fishing; and the case alleged is, that the city, availing themselves of that office, have encroached on the rights of the Crown, and made grants of the soil. The city, therefore, standing in a fiduciary situation towards the Crown, as its bailiff or conservator, has a duty to protect the rights and interests of the Crown, in the same way as a tenant is under an obligation to take care of the right of his landlord: Speer *v.* Crawter;[4] and who is even bound to produce an opinion of counsel taken by him with reference to his landlord's title. Attorney-General *v.* Berkeley.[5] The defendants are incapacitated from encroaching, and then setting up an adverse title to the soil, which would be totally inconsistent with the office held by them under the Crown. They can have no title to the soil, except under the Crown, and are bound to specify what has been granted to them, and in what character they hold.

The ordinary principle is, that where a person in a fiduciary situation claims something inconsistent with the acknowledged subsisting relation, he is bound to discover the extent of it. Thus, where a tenant confuses the boundaries of his landlord's property with his own, he is bound to separate them. Speer *v.* Crawter.[6] Could the bailiff of an estate, when called up to account, be permitted to say, "I am the owner of the property, I have let the estates, received the rents, cut timber, and exercised other acts of ownership; I deny your title, and decline telling you what mine is, and giving you any information respecting it?" Such, however, is the nature of the case here. A similar illustration, put in the House of Lords, was this: If the warden of a royal forest, with specified duties, were to cut timber or take the soil, could he refuse to state the extent and nature of his duties, or be allowed to set up an adverse title to the soil?

Again, the defendants have not set up their case by plea of adverse title; that would not be possible, for the modern acts of ownership are referable to their character of bailiffs, and no possession,

[1] Wigram on Discovery, 285, 2d ed.
[2] Hale, De Jure Maris, 12.
[3] Hale, De Jure Maris, 25.
[4] 17 Ves. 216.
[5] 2 Jac. & W. 291.
[6] 2 Mer. 410.

if possession could be had of a public navigable river, could be adverse. They have submitted to answer, and must, therefore, by the rules of pleading, answer fully. Shaw *v.* Ching.[1] The 38th General Order of August, 1841,[2] applies only to matters which are demurrable, and not to matters which may be covered by a plea. . . .

Mr. *Bethell*, in reply. First, the defendants have pleaded issuably: they have pleaded a common-law prescriptive title in the usual form; but, if they have not, they alone will suffer by it at the hearing. "It is at the peril of the defendant if his pleadings are defective in this respect; but this is quite independent of the law of discovery."[3] It is the essence of a prescriptive title to rely on the immemorial usage: to rely on written documents would at once destroy it.

Secondly. As to the alleged fiduciary relation. The office of conservator is not like that of a bailiff accountable to his principal. The duties are performed by the mayor, and not by the corporation aggregate. The defendants have given all the necessary discovery in respect of that relation; but the right of the Crown to discovery in respect of the conservancy gives no right of discovery as to the independent title of the city to the soil of the river. If A. B. were owner in fee of an estate, and trustee for C. D. of a rent-charge issuing out of it, C. D. could not maintain a suit to discover A. B.'s title to the fee, or insist on any discovery *ultra* the rent-charge. . . .

The Master of the Rolls reserved his judgment.

April 4.

The Master of the Rolls. This case came on upon exceptions to the Master's report, by which he has allowed certain exceptions taken by the Attorney-General to the defendants' answer to the information.

It is admitted that the answer is not full; but the defendants, having answered to some extent, insist that they are not bound to answer further; and they support their exceptions principally by saying that, having stated a sufficient title to the matters claimed by the Crown in this information, they are not now bound to state further the particulars of that title, the mode in which they intend to make it out, or the evidence by which it is to be supported.

In the course of the argument in this case it was suggested that this endeavor to enforce further discovery in this case was an attempt on the part of the Crown to encroach on the rights of the subject. In this place, and on this occasion, I have nothing to do with any ques-

[1] 11 Ves. 303. See Lancaster *v.* Evors, 1 Phillips, 349.
[2] Ord. Can. 175. [3] Wigram on Discovery, 285, 2d ed.

tion of that sort; but the suggestion seems to require the observation that the Crown by this information is seeking that which, if recovered, can be held only for the benefit of the public at large, and not for any private or separate interest whatever.

In the consideration of the case we have to consider both the office of conservator or bailiff of the river Thames, and the right to the ground and soil of the bed and shores, between high and low water marks of the same river.

It is stated by the information, and admitted, that the mayor or the corporation of the city of London has for a long period held and exercised the office of bailiff or conservator, the office being exercised by the mayor for the time being or his sufficient deputies.

Upon this there is no controversy. The information further alleges, 1. That by the royal prerogative the ground and soil of the coasts, and of every port, haven, and arm of the sea, and navigable rivers into which the sea ebbs and flows, and the shores between high and low water marks, belong to Her Majesty, and that Her Majesty hath right of empire and government over the navigable rivers of the kingdom. 2. That Her Majesty and her progenitors, time out of mind, is and have been seised, in right of the Crown of England, of and in the port and haven of London, and of the river Thames, the same being an arm of the sea into and from which the sea has always flowed and reflowed. 3. That the same river is also, and from time immemorial has been, an ancient, royal, and navigable river and king's highway for all persons with their ships, vessels, boats, and crafts to pass, repass, and navigate, at their free will and pleasure, and to moor their vessels in convenient parts of the river, not impeding the navigation thereof. 4. That the defendants have held the office of conservator of the river by prescription, or under some grant from the Crown. 5. That the duty of the mayor or corporation, as bailiff or conservator, is to see to the navigation of the river, to prevent the erection of nuisances and obstructions in the river, and to regulate the fishing thereof. 6. But that the mayor or corporation does not, by virtue of the office of bailiff or conservator, take or acquire any interest or estate in the ground or soil of the bed or shores of the river.

Such being the general allegations relating to the title of the Crown, the defendants, on their part, allege that the corporation is, and from time immemorial has been, seised and possessed of, and well entitled to, and been in the actual uninterrupted possession of, by acts of ownership over, the bed and soil of the river and also the banks and shores thereof between high and low water marks, and has, for all the time aforesaid, been in the actual and exclusive exercise and enjoyment of all such rights as belong to and are capable of being exercised and

enjoyed by the owner of the legal estate and interest in the bed and soil of the river.

This claim, in shorter expression, has been at the bar (I think correctly) explained to be a claim on the part of the corporation to be entitled, by prescription, to the freehold of the bed and shores of the river, *i.e.*, to the land itself over which the river flows. The corporation claiming this title, not to any incorporeal hereditament, but to the land, further say that from time immemorial they have had and held the office of bailiff or conservator (the conservancy of the river being exercised and occupied by the mayor for the time being or his sufficient deputies), and have taken for their own use all wages and profits pertaining to the same office of bailiff. The claim of the corporation seems to be that it has been immemorially owner of the land over which the river flows, and has immemorially held the office of bailiff or conservator of the river.

It may be observed that the right claimed by the Crown to the bed and soil of navigable rivers is a right belonging to the Crown by the common law, and extends and is applicable to the bed and soil of the river Thames, unless excluded by a stronger title in the defendants or some other; that, by the general rules of law, a title by prescription can only be made to incorporeal hereditaments; that the office of bailiff or conservator (claimed contemporaneously by the defendants) implies an authority or delegation conferred by some other, and can scarcely, if at all, be made consistent with the claim of ownership, which, to a large extent at least, would exclude the notion of any such delegation or authority from another. There is no authority for saying that the grantor of an office, the duties of which are performed upon land originally belonging to the grantor, is not entitled to compel the grantee of the office claiming the land to discover the means by which he has, as he alleges, during his exercise of the office become entitled to the land or the property upon which the authority to grant the office depends.

In the present case, and on this occasion, without entering into an investigation of the general rights and prerogatives of the Crown with respect to the coasts of the sea and to navigable rivers, I consider myself bound to presume that the office of conservator or bailiff of the river Thames must have been, and must be held to have been, derived from the Crown, and held under the Crown by its own grant or commission, or by act of Parliament necessarily made with the concurrence of the Crown; and that the power, estate, or authority, by or out of which the office of conservator or bailiff was granted or derived, must be presumed to have reserved or kept to itself all that was not granted with the office of conservator.

I am desirous to state this distinctly, in order that, if it be erroneous, the error may be the more easily detected and corrected. I think that the office of conservator, being derived from the Crown, must be held to be of a fiduciary nature, and that the corporation must be held to have had imposed upon it, not only the duty of faithfully executing the office of conservator, but of so exercising it as to protect and not encroach upon the rights of the crown.

The office of conservator is plainly of such a nature that, in the performance of its proper duties, many and easy opportunities would occur of doing more than a narrow and strict performance of the duties required, and that some degree of extension might be convenient and useful, and, for that reason, would be more likely to be permitted or acquiesced in for the occasion than complained of on behalf of the public, and therefore, in a case like this, such acts as might seem to be acts of ownership may have less probative force than they might have in many other cases.

The other grounds on which the defendants claim to be protected from discovery do not appear to me to be of any weight; and, on a consideration of the whole case, having regard to the nature of the title claimed to the bed or soil of the river, to the circumstances under which it is claimed, and to the relation which subsisted between the Crown and the corporation in respect of the conservancy, I am of opinion that the defendants are not entitled to refuse the discovery which they are required to make, and that the exceptions to the Master's report must be disallowed.

I have come to this conclusion without reference to any peculiar right in the Crown to claim more discovery than can be claimed by one subject against another, and I give no opinion upon that point.

From the foregoing decision the defendants appealed to the Lord Chancellor.

Mr. *Bethell*, Mr. Serjeant *Merewether*, and Mr. *Randell*, for the defendants.

The *Solicitor-General* (Sir John Romilly) and Mr. *Maule* supported the decision of the Master of the Rolls.

Mr. *Bethell*, in reply.

December 17.

The LORD CHANCELLOR. The defendants, by their answer, deny the title of the plaintiff to the bed and shores of the river. They do not, it is true, set up any title in themselves other than what may arise from possession; but still they distinctly allege their own right, and negative that of the plaintiff. Now, nothing can be more clear,

from authority and universal practice, than that a plaintiff is entitled to discovery not only of that which constitutes his own original title, but that he is also entitled to a discovery for the purpose of repelling what he anticipates will be the defence. Since replications have been disused, the plaintiff endeavors to obtain what he before would have got by a replication, by anticipating the defence if he knows what it is, and alleging those facts which, if true, would show that the defence is not available against him. An ordinary instance of this is a release which the plaintiff thinks he can impeach. In such a case the bill leaves untouched the question of the original title, but anticipates that the defendant will set up a release, and, on this supposition, charges that which would prevent the operation of the release. But a more ordinary case, and one more adapted to the immediate circumstances of the present, is where a plaintiff anticipates the defence of purchase without notice. In this case the plaintiff makes the defendant pretend a purchase without notice, and then charges circumstances which would show that there was notice, so as to destroy the defence which he thinks will be set up.

This is the ordinary method where the plaintiff can anticipate what the defence will be; but if a defence may be set up which he cannot anticipate, the universal practice (I shall see presently whether it is supported by authority), in order to meet the whole of the defendant's case, is to ask the defendant what his defence is. It was said in argument that an answer has only two objects, the one for affording to the plaintiff the discovery of that which constitutes his title, and the other for enabling the defendant to set up what he relies upon as his defence; but I apprehend that there is, on the part of the plaintiff, a right in addition to that which is stated in this proposition, and that, independently of discovery to show his title, he is entitled to a discovery to repel the defence which he expects will be set up against it. For this we have the authority of Lord Redesdale and the Vice-Chancellor Wigram. Lord Redesdale says:[1] "The plaintiff has a right to the discovery of the case on which the defendant relies, and of the manner in which he means to support it." Vice-Chancellor Wigram rather quarrels with the generality of this proposition, saying, however:[2] "That a plaintiff is entitled to a discovery of the case on which the defendant relies, that is, that the plaintiff is entitled to know what the case is, admits of no doubt;" nor does it admit of any doubt, for if the plaintiff apprehends that the defendant will not put some matter in issue which may constitute his defence, or if he wishes for more information about it than he thinks he is likely to get without putting such a question, he has a right to ask what the defence is. It

[1] Mit. Pl. 9, 4th ed. [2] Wigram on Discovery, p. 285, pl. 372, 2d ed.

is quite a different matter that he is not entitled to the evidence upon which that defence is intended to be supported; and I apprehend that the language of Lord Redesdale has been rather misunderstood by Vice-Chancellor Wigram, because when Lord Redesdale says that the plaintiff is entitled to a discovery of the case on which the defendant relies, and of the manner in which he means to support it, Lord Redesdale does not intend to say that he is entitled to all the evidence by which it is to be proved but only that he has a right to know what the case is. It is not, therefore, enough for a defendant to deny the plaintiff's title, and to assert his own, but he must also show how he derives his right, — must show, in short, that he has a title which, if proved, would displace that of the plaintiff. It does not follow from this that the plaintiff is entitled to see the documents by which the defendant's title is proved; on the contrary, the authorities show that he is not; and Lord Redesdale himself expressly draws that distinction: he says,[1] "Where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims." We have it, therefore, on the authority of Lord Redesdale, that the plaintiff is entitled to know what the defendant's case is, and how he makes it out, but not to see the proofs by which that case is to be established.

Now it was said that the statute of James, as pleaded in the answer, gives a party against whom the Crown is litigating an advantage different from that which belongs to every other defendant. I do not at all so understand it. The object of the statute was to put a party who was contesting with the Crown in the same situation as a party contesting with any other plaintiff; but here in equity the Crown and the subject always were on the same footing, and they are on the some footing now: there was no evil, therefore, to be remedied. At law, however, there was, arising from technical reasoning, a great injury accruing to a defendant in litigation with the Crown. The Crown's title was taken to be proved, unless a contrary title was set out and pleaded. That was a privilege which the Crown maintained against a defendant at law; but no such privilege has ever been asserted here; nor am I at all aware of there being any different rule, as far as discovery is concerned, applicable to a suit between the Crown and a subject, and a suit between ordinary parties.

It is to be considered, then, what it is that the defendants in the present case have set out. They have certainly negatived the plaintiff's title, but have not set out any distinct title in themselves, except that which arises, or may be inferred, from the absence of title in the plain-

[1] Mit. Pl. 190, 4th ed.

tiff. They are conservators of the river, but they say that that conservancy is distinct from their title to the soil. No doubt it is; but it is not to be lost sight of that it may nevertheless give an opportunity for what would be very important acts of ownership and jurisdiction over the Thames, if they were exercised by a party who had not that access which the right of conservancy gives to the defendants. An agent cannot well get an adverse title, unless he can very distinctly show that what he has done is in respect of title and not in respect of his agency. That is exactly the situation in which the defendants stand; and in that view, in order hereafter to see how far acts of agency negative the plaintiff's title, for which purpose alone they could be used, by showing an adverse title in the defendants, it never can be lost sight of that the defendants are conservators. It has been argued, however, that this is not so, and that in point of fact the office of conservator is exercised by the lord mayor, and not by the corporation. Now, how that may be upon the charters I do not inquire; but I find upon the answer that there is a most dictinct statement that the defendants are themselves the conservators. The answer states that they exercise that jurisdiction by means of the lord mayor of London acting for them, but that the right to the conservancy is in the corporation. This statement is to be found in various passages; and that it may be stated more broadly than the charters warrant, is immaterial: it is sufficient for the present purpose to show that that is the title which the defendants claim.

We have already seen that the plaintiff is entitled not only to a discovery of that which constitutes his title, but also to a discovery of every thing which may enable him to defeat the title which is expected to be set up against him. In the cases of Jones *v.* Davis,[1] Evans *v.* Harris,[2] and Harland *v.* Emerson,[3] this is very distinctly stated and recognized as the practice of the court; and in Stroud *v.* Deacon,[4] where the bill charged that a deed, which was the defendant's title, contained evidence which would defeat it, the defendant was compelled to answer. Now, it is also perfectly clear that if the defendant pleads a deed which constitutes his title, he cannot be compelled to produce it, because it is his own title, and not that of the plaintiff; but if the plaintiff alleges that that deed contains something which would show or support his, the plaintiff's, title, the defendant is bound to answer an interrogatory founded on that allegation, because, although the deed is the defendant's title, it may be the most important part of the evidence of the plaintiff, who may find in it a recognition of that which, if true, would supersede the title set up by the instrument

[1] 16 Ves. 262.
[2] 2 V. & B. 361.
[3] 8 Bli. N. S. 62.
[4] 1 Ves. 87.

itself. In the case to which I have referred, Stroud v. Deacon,[1] that point was distinctly raised; but there are several other cases where it has also arisen. There is one in particular: it was the case of a bill and cross-bill. The suit was instituted for tithes, and the bill alleged that a book which belonged to the defendant contained receipts constituting a recognition of a modus. The court, on the ground that this would be evidence in support of the plaintiff's case, ordered the defendant to answer the allegation, and subsequently compelled a production of that part of the book which contained the receipts. In short, the general principle of the court in the cases to which I have referred shows that, although the defendant will not be compelled to produce a document which is the evidence of his title, yet, if he intend to avail himself of that protection, he is bound to negative that which the bill alleges such a document to contain, so far as it would be evidence of the title of the plaintiff. The reason is that, whether it be something to be found in the document itself, or to be inferred from the absence of it in the document, the circumstance alleged is alleged not for the purpose of investigating what the defendant may have to show as proof of his title, but for the purpose of establishing or strengthening the plaintiff's title or of repelling that which he expects to be set up against it, all of which are legitimate points of discovery.

With these preliminary observations, I proceed now to consider what the exceptions in the present case are, what it is that the defendants decline to discover, and what the Master of the Rolls has decided they are bound to discover. I may first observe that the case relied upon, of a party not being bound to produce evidence of his own title has very little application to a case where the defendant in point of fact has set up no title but merely that which negatives the plaintiff's title. Great discussion has sometimes taken place as to the effect of a negative plea; but it is quite new to hear of a negative answer, that is, an answer which merely denies the plaintiff's title, and refuses on this ground to afford any discovery. The case, however, must be looked at as it appears on the plaintiff's bill.

Now the first exception is in reference to the interrogatory, — "Whether it is not true that no charters or letters-patent given or granted by any of Her Majesty's predecessors, kings or queens of this realm, contain any grant of the ground, soil, or bed of the river Thames, or of the shores thereof between high and low water mark, to the mayor, commonalty, and citizens, or how do the defendants make out the contrary." That is not the whole of the interrogatory, but I take that branch first. If the plaintiff is right in the general proposition that all beds of all navigable rivers are vested in the Crown, as laid down

[1] 1 Ves. 87.

by Lord Hale, then the defendants can only claim by some grant from the Crown. Now, the defendants have not told us how they claim, and, therefore, if they are entitled to go into the case at all upon these pleadings, they may be able to establish their title, and may intend to establish it, by producing some charter. But the plaintiff says there is no charter containing any grant of the soil. The question, then, between the parties being to whom the soil belongs, the plaintiff says that charters have passed from the Crown to the corporation of London, and that in none of them is there any grant of the soil. He, therefore, does not ask to see these charters, which may or may not operate for the advantage of the defendants; but it being part of his case that, in all deeds which are provable between him and the defendants, there is no grant of the soil or bed of the river, he has clearly a right to discovery, in order that, when the matter comes to a hearing, he may have an admission from the defendants themselves that no charter contains any such grant. This falls distinctly within the principle of the cases to which I have already referred; and it is quite independent of knowing what the defence is, that the plaintiff has a right to a discovery of what those charters do or do not contain, so far as it constitutes his own title. Then comes the other part of the interrogatory, about which I had more doubt than about any other portion of the case. It is in these words: "And that the defendants may discover and set forth under or by what charter or letters-patent or other grant they claim to be entitled to the freehold of the soil." Now, that looks like an investigation of the defendants' title, but it is not an investigation of the proof of that title except as to that which constitutes the foundation of it; and that comes exactly within what Lord Redesdale says, and in which the Vice-Chancellor Wigram concurs, that the plaintiff is entitled to a discovery of the case upon which the defendant relies: he is entitled to know what that case is. But Lord Redesdale goes further, adding, "and how he means to support it." If by these words it is intended to say that the plaintiff in the present case might ask to see the charters, and thus to investigate the evidence on which the defendants rely, that would clearly be going beyond what the rule of the court would permit, and Lord Redesdale would have expressed himself too largely; but taking the words in a restricted sense, they simply enable the plaintiff to ask under what title the defendants claim the property which the plaintiff asserts to be still vested in the Crown. Although, therefore, that part of the interrogatory was apparently open to some doubt, yet I think, for the reasons I have just stated, that the plaintiff is clearly entitled to an answer to the whole of the interrogatory embraced in the first exception.

With regard to the other exceptions, they will be found to fall within the same principle as that which I have already observed upon with reference to the first. The second exception is, — (his Lordship here read the second exception). The question refers to charters recognizing or confirming a grant; and, therefore, as to the plaintiff's right to know their contents, this and the first exception stand precisely upon the same footing.

Then the third exception is, — (his Lordship here read the third exception). Now, this relates to a matter of fact, namely, whether the charter of Henry VI. is now in operation, or has been revoked. The defendants decline to answer; but if there be such a charter, it is, of course, necessary for the plaintiff to know whether it is now in force, or has been revoked. It is a fact quite unconnected with the defendants' title, and the exception must accordingly be allowed.

The fourth exception is, — (his Lordship here read the fourth exception). This has immediate reference to the two different positions in which the defendants stand, that of conservators, and that, as they allege, of owners of the soil. Beyond all doubt they are conservators, and certain acts have been done by them; and the question is, whether those acts are referable to their claim of title, or are not to be explained by the control and dominion which, as conservators, they have obtained over the bed and soil of the river. Now this is no investigation of the defendants' title. The question may not be of much benefit to the plaintiff, as the answer to it is perfectly obvious, for the defendants who set up that they have a title will refer all acts of ownership to that title; but it does not follow that, on this account, the defendants are entitled to refuse to answer it. It is not to be answered by the corporation only under their seal, but the officer of the corporation is made a party to the information. He may, therefore, when he comes to answer this question, have to consider whether he can safely say that the acts of ownership alleged are altogether referable to the title set up, or whether they may not be referred to the power and authority of the corporation as conservators. It is a fact which it may be very important to the plaintiff to know; for if he should get an answer that those acts of ownership are not to be referred to the title, but to the office of conservator, a great step would be made towards establishing his title and negativing that of the defendants. It appears to me, therefore, that this and the foregoing exceptions, except perhaps the latter part of the first, fall clearly within the rule established by the authorities already referred to.

Then comes the last exception, which is a general inquiry as to the possession of documents. Now, in the first place, if the defendants have not set up an adverse title, it is impossible for them to protect

themselves by the rule that a defendant is not compellable to make a discovery relative to his title, because that must be founded upon his having set up some title. I confess that, looking very anxiously through these papers, I am very much inclined to think that there is no title set up, in the sense and meaning of that term as applied to the protection of a defendant from discovery. There must be some legal foundation for his title before a defendant is to be at liberty on that ground to protect himself from discovery. I cannot consent to his doing so under an idea of that being his own title, which is merely, in fact, a negation of the plaintiff's title. It is not, however, necessary to come to any decision upon that point, because I think there is quite enough upon the mode in which the interrogatory is answered to show that the defendants are not entitled to the protection which they seek. Their answer is divided into two parts: the defendants endeavor to answer what they feel they are bound to answer, and to protect themselves against the remainder. They admit that they have in their possession certain deeds, &c., relating to the right and title of the defendants to the freehold of the bed and soil of the river, and the enjoyment thereof, all which several deeds, &c., evidence and show, or tend to evidence and show, such right and title of the defendants, and all which deeds, &c., they are advised and believe form material parts of the evidence possessed by the defendants of their right and title, and all which are intended to be made use of and given in evidence by the defendants in support of their right and title, in the cause, and none of which do, as the defendants are advised and believe, evidence or tend to show or prove the pretended and alleged right of the Crown set up in the information, nor would the informant derive any proof in support of his case from the production of such deeds, &c., or any or either of them. Then they say that they have other papers, which they do not seek to protect in the same way. Now, in the first place, the charge is, that the deeds, &c., "relate to the matters aforesaid," that is, to the matters stated in the information; and the defendants take upon themselves to say that they believe that they do not contain evidence of or tend to show the plaintiff's title. Have the defendants a right to do this? They do not allege that the documents do not "relate to the matters aforesaid;" nor is there any description of what they are, so as to enable the court to decide this point. If such a proceeding could be permitted, a plaintiff would never get a discovery of any documents, because the defendant might always protect himself by merely pleading his belief that they did not contain evidence tending to prove the plaintiff's case. Now there is a case somewhat similar to the present, Jerrard v. Saunders,[1] where a party endeavored to protect himself from the discovery of certain deeds by

[1] 2 Ves. jr. 187.

a plea of purchase for valuable consideration without notice, and an averment that the party under whom he claimed had not, to his, the defendant's, knowledge and belief, any notice of the title set up by the plaintiff; but the defendant did not answer the facts charged in the bill as affecting him with notice. The court refused to allow the defendant to be the judge of what was constructive notice, and held that he was bound either distinctly to negative the grounds on which the plaintiff asked for the production of the deeds, or to produce them. Now, if the defendants have not set out a title, which appears to me to be the result of the pleadings in this case, then it is not necessary to resort to more authorities to ascertain whether there ought to be an answer to this last interrogatory or not. But even on the conclusion that they have set out a title, they are still not entitled to protect themselves from the discovery of these documents, so as to withhold all information as to what they are, or whether there are any such at all. I think, therefore, that this exception must also be allowed, and that the Master of the Rolls came to a right conclusion.

I do not follow the whole of the reasoning of the Master of the Rolls; but, on looking through the pleadings, the grounds on which it strikes my mind that the discovery ought to be made are so very clearly explained in the text-books and by the authorities, that it is unnecessary to advert to more than what I have already said with respect to the united character of conservancy and claim of title. It is obvious that it is very difficult to reconcile the circumstance of those two things existing together, and that it entitles the plaintiff to a very scrutinizing inquiry for the purpose of separating the acts which may be referred to one, or which may have arisen from the exercise of the other. It is impossible not to observe that, if those two things are united in one and the same body, the interests of the public are not secured. It is the duty of the corporation, as conservators, to prevent obstruction, and to take care that the bed of the river is not applied to any purposes of profit to the prejudice of the public; but, as owners of the soil, they would, no doubt, have an opportunity of doing that which might be very inconsistent with this duty. The information, however, is not confined to the title arising from ownership of the soil, for it alleges that if the defendants are owners of the soil, and if, therefore, the Crown has not that authority and power which would arise from the general power and title of owner of the soil, then the acts mentioned are neglects or abuses of the power and jurisdiction of the corporation as conservators, and are to be treated as nuisances. That, however, does not touch the matter under consideration upon these exceptions; and, upon the grounds before stated, I think that the interrogatories to which the exceptions relate must be answered, and that the appeal from the Master of the Rolls must be dismissed.

STAINTON v. CHADWICK.

BEFORE LORD TRURO, C. JULY 24, 28, AND 29, AND NOVEMBER 8, 1851.

[*Reported in* 8 *Macnaghten & Gordon*, 575.]

THIS case came before the court upon an appeal from an order of the Master of the Rolls, allowing certain exceptions for insufficiency taken to the defendant's answer.[1]

It appeared from the pleadings that Sir Andrew Chadwick, who died intestate in the year 1768, was equitably entitled to considerable real estate, the legal estate being then outstanding in trustees for him; and the main question between the parties was, who was the heir-at-law of Sir Andrew Chadwick, the plaintiff insisting that a Mrs. Law, the cousin of Sir Andrew, was his heiress-at-law, under whom the plaintiff claimed to be entitled to that portion of Sir Andrew's estate which was in litigation in this cause; while on the part of the defendant it was insisted that one James Chadwick, and not Mrs. Law, was the heir-at-law of Sir Andrew, and that the defendant was a legal descendant from that James Chadwick, and in that character was entitled to the litigated property.

The bill stated the seisin of Sir A. Chadwick of the property in question, among other considerable real estate, with many details relative to the state of the title to the realty, and also to certain leases and underleases not necessary to be minutely stated. It further stated that Sir A. Chadwick died intestate in the year 1768, leaving Mrs. Law his heiress-at-law, and deduced the title from Mrs. Law to the plaintiff, and stated that by force of the plaintiff's equitable ownership he had succeeded to the receipt of the rents reserved in the underleases of the houses in question, under which the assignees of the terms thereby granted were in the actual occupation of the houses, and that he continued down to Michaelmas, 1847, in receipt of such rents, and he insisted that thereby he was in point of law in constructive possession of the premises by his tenants, and entitled to the possession against them.

It further appeared that, in 1840, the defendant presented two petitions to this court under the statutes of 1 Will. 4, c. 60, and 4 & 5 Will.

[1] See 13 Beav. 320. — ED.

4, c. 23, commonly called Sir Edward Sugden's Acts. One of those petitions prayed that it might be declared that one Samuel Horsey was a trustee of the premises therein mentioned for Sir A. Chadwick and his heirs, and that the heir of the said Samuel Horsey was then a trustee of the same premises for the petitioner as the heir-at-law of Sir A. Chadwick, and that the court would direct some person in the place of the heir-at-law of the said S. Horsey to convey the premises in such manner as the petitioner should direct; and the other petition prayed a similar declaration as to one William Compton, and the premises comprised in that petition. Orders of reference were made on these petitions, and the Master reported that the heirs of the trustees in whom the legal estate had been vested could not be discovered, and the Master also reported that the defendant was the heir-at-law of Sir A. Chadwick, and equitable owner of the estates which had belonged to him. Upon these reports an order was obtained by the defendant directing a conveyance of the legal estate, and the defendant's solicitor was appointed to execute such conveyance, which was accordingly done.

The bill alleged that the proceedings before the Master were all *ex parte*, and that the evidence and statements presented by the defendant to the Master, upon the faith of which the Master was induced to report, contrary to the truth of the fact, that the defendant was the heir-at-law of Sir A. Chadwick, and as such equitably entitled to the property in dispute, were false and fraudulent, and consequently that the order for the conveyance of the legal estate to the defendant was obtained by fraud and imposition upon the court. The bill then alleged that by means of the legal estate so obtained the defendant, although a stranger to the family of Sir A. Chadwick, and destitute of all equitable title, had the control at law of the possession of the property, and that the plaintiff was thereby altogether precluded from legal remedy; and that after having so obtained the legal estate, the defendant purchased the terms in the underleases before mentioned, and induced the actual occupiers of the respective premises to attorn to him, and so obtained possession of the premises. The plaintiff also alleged that the underleases had since expired, and the right to actual possession of the houses had, therefore, reverted to him, but that the defendant retained the possession, and by force of the legal estate precluded the plaintiff from the effectual prosecution of the legal remedies to obtain possession, which, except for such legal estate, he might enforce; and the bill prayed a declaration that the plaintiff was equitable owner of the property in question mediately from Mrs. Law, and that the defendant was trustee of the legal estate for him, and might be decreed to convey it according to the plaintiff's appointment, and in the mean

time that the defendant might be enjoined from setting up or in any manner using the legal estate.

The bill contained interrogatories calling for a discovery of various matters connected with the titles of both plaintiff and defendant, but it is only material to advert to those interrogatories addressed to the discovery of the alleged false and fraudulent evidence and statements by which the order for the conveyance of the legal estate was procured.

The defendant, in his answer, asserted his own title as heir-at-law of Sir A. Chadwick, and denied that Mrs. Law was the heiress of Sir A. Chadwick, and that the mesne conveyances under which the plaintiff claimed had vested the equitable estate of the property in question in the plaintiff. It was admitted that Mrs. Law and others claiming under her had received the rents reserved by the underleases, but it was denied that such receipt was any evidence or any admission of the title to the reversion; and then, after answering some of the interrogatories contained in the bill, the defendant refused to answer any of the interrogatories relating to the evidence stated and produced before the Master, and asserted that he could not give that discovery without disclosing the evidence of his own title; and the defendant denied that any of the evidence or statements produced before the Master were either false or fraudulent, or that they would establish or prove any of the allegations in the bill. The refusal to answer these interrogatories gave rise to the exceptions which were the subject of the present appeal.

Mr. *R. Palmer* and Mr. *Bird*, in support of the appeal. The defendant has answered every question affecting the common title of the plaintiff and himself, and every thing relating to the plaintiff's title exclusively, but he declines to give any information of that which concerns his own title exclusively. The plaintiff's rights are alleged to be by means of divers mesne conveyances from parties claiming under Sarah Law, and it is quite consistent with the defendant's rights to the inheritance that Sarah Law and the plaintiff as her assignee should have received the rents of the premises, these rents not being payable to the reversioner, but to Sarah Law, in accordance with the decree made in the suit of Scott *v.* Fenhoullet.[1] If the discovery was afforded in this case, any stranger claiming through an alleged pedigree might file a bill against a party succeeding in an action of ejectment, and assert a right to see the evidence of the title on which the plaintiff in that action had succeeded. The defendant in the present case is in possession both by law and in fact; but this possession cannot be referred to that of a tenancy, for when the defendant obtained the legal estate under the order of the court, his position was not that of tenant, and it was not till some years after that he bought up the leases and got into

[1] 1 Bro. C. C. 69.

the actual possession of the property. The rule in reference to discovery, as the defendant asserts it, was not disputed in the court below, but it was contended that the allegation of fraud made a difference. We submit, however, that this, even if proved, would not help the plaintiff's case, which must be established on the strength of his own title, and not on the imbecility of the defendant's; and that when the title of the plaintiff is positively denied, as it is in the present case, this court will refuse to compel a discovery. Abery *v.* Williams;[1] Marquis of Donegal *v.* Stewart;[2] Phelips *v.* Caney;[3] Jacobs *v.* Goodman.[4] (They also referred to Ivy *v.* Kekewick,[5] Wilson *v.* Forster,[6] Firkins *v.* Lowe,[7] Wilson *v.* Forster,[8] Bolton *v.* Corporation of Liverpool,[9] Mit. Pl. pp. 189, 190, 191, 4th ed., and Wigram on Discovery, pp. 264, 270, 2d ed.)

[In the course of the argument the Lord Chancellor referred to the case of Hall *v.* Maltby.[10]]

The *Solicitor-General*[11] and Mr. *Glasse*, in support of the decision of the Master of the Rolls. The question raised in this case turns upon the application of the principles of the law of discovery as recognized by this court. We assert that the defendant has obtained an order to which he is not entitled, and that we have a right to a discovery of the means by which he obtained it. The defendant cannot protect himself from this discovery by mixing up with it other matters and treating it as a disclosure of his title to the property. Although a plaintiff has no right to see that which of itself makes out the defendant's title, yet he has a right to see that which either directly makes out, or may give him a knowledge tending to make out, his own title. The evidence inquired after would go merely to the point of proving the truth of the representations made by the defendant; in other words, to show whether the order for the conveyance sought to be impeached was or not fraudulently obtained. We further submit that if we can show that the plaintiff was in possession by receipt of the rents, and that the act of the defendant in obtaining the conveyance of the legal estate was fraudulent, we shall reverse the state of things, for then the defendant's possession must necessarily be referred to the tenancy under the term, and it is indisputable that a party cannot set up a title adverse to that of his landlord. (They cited and commented upon the following authorities: Stroud *v.* Deacon;[12] Smith *v.* The Duke of Beaufort;[13] The Attorney-General *v.* The Corporation of London;[14] Kennedy *v.* Green;[15] Chadwick *v.* Broadwood.[16])

[1] 1 Vern. 27. [2] 8 Ves. 446. [3] 4 Ves. 107.
[4] 2 Cox, 282. [5] 2 Ves. jr. 679. [6] 2 M'Clel. & Y. 274.
[7] 18 Price, 193. [8] Younge, 280. [9] 1 Myl. & K. 88.
[10] 6 Price, 240. [11] Sir W. Page Wood.—Ed.
[12] 1 Ves. 87. [13] 1 Hare, 507, 1 Ph. 209.
[14] 2 Mac. & G. 247. [15] 6 Sim. 6. [16] 8 Beav. 808.

[The Lord Chancellor in the course of the argument referred to the case of Doe *v.* Smythe,[1] and to the cases collected in the note to the case of Veale *v.* Warner,[2] upon the effect of the expiration of a term upon the right of a third party to come in and defend as landlord on the trial of an ejectment. His Lordship's attention was, however, subsequently directed by Mr. Glasse to the cases collected in the note to Doe *v.* Rhys,[3] as being opposed to the authority of Doe *v.* Smythe, upon which Doe *v.* Rhys was founded.]

Mr. *Bird*, in reply, cited Doe *v.* Wolley,[4] and referred to Sugd. Vend. & Purch. vol. iii. p. 88, 10th ed.

November 8.

The Lord Chancellor, after detailing the facts of the case to the effect hereinbefore stated, proceeded as follows:—

Two distinct heads of equity are attempted to be raised by the bill; the one is, that the plaintiff is equitable owner of the property in question, under Mrs. Law, who was the heiress-at-law of Sir A. Chadwick, and that the defendant, who has acquired the legal estate from the trustees in whom it was vested in trust for the equitable owner, now is seised of such estate as trustee for him, the plaintiff, and ought therefore to be decreed to convey such estate to him. The other head of equity is, that the defendant became such trustee by fraud and imposition upon the court, and is now using the legal estate of which he is such trustee inequitably and fraudulently against the plaintiff, who is the equitable owner, and therefore that the defendant ought to be restrained by injunction from such improper use of the legal estate. The interrogatories which the defendant refused to answer wholly relate to this second head of equity. The question therefore is, whether, regard being had to the whole state of the pleadings, including bill and answer, the plaintiff is entitled to a discovery of the alleged false and fraudulent evidence and statements by means of which the conveyance of the legal estate is alleged to have been procured. In considering the plaintiff's equity to the discovery which the defendant refuses to give, it should be observed that the legal estate does give to the defendant the power and advantage which the plaintiff ascribes to it. In other words, it does control the actual possession of the property in question; because, however clearly the plaintiff may establish that Mrs. Law was the heiress-at-law of Sir A. Chadwick, and his derivative title under her, and however groundless the defendant's case founded upon his pretension of being the heir-at-law of Sir A. Chadwick may be, still the legal estate must prevail and effectually control the possession of

[1] 4 M. & S. 347.
[2] 1 Saund. 324.
[3] 2 Y. & J. 88.
[4] 8 B. & C. 22.

the premises; and it is upon this ground, and that such legal estate is alleged to have been obtained by fraud and imposition upon the court, that the plaintiff founds his equity to the discovery of the circumstances constituting that alleged fraud and imposition, and of the evidence by which the bill alleges the fraud will be proved.

On the defendant's part it is contended that in the present state of the pleadings the plaintiff has no equity which entitles him to the discovery which is withheld: first, because the right of such discovery is only consequential upon the plaintiff's establishing that Mrs. Law, under whom the plaintiff claims, was heiress-at-law of Sir A. Chadwick, which fact is denied by the answer; secondly, that the alleged fraud in obtaining the order for the conveyance of the legal estate is in general terms also denied; thirdly, that the discovery sought for necessarily involves a disclosure of the evidence of the defendant's case and title as heir-at-law of Sir A. Chadwick. He therefore insists that, the equity of the plaintiff being thus denied, he has no right to the discovery, which is consequential upon the title being either proved or admitted by the answer; and he further says that by the law of the court, if two parties are contending for the same property upon conflicting titles, neither is entitled to a discovery from the other of the evidence by which the case and title of such other is to be supported. The plaintiff replies to these objections, not by a denial of the principles or propositions contended for by the defendant, but by the assertion that all such propositions are subject to qualifications which render them inapplicable to the present case, or, in other words, which remove them as grounds to exempt the defendant from giving the discovery prayed for by the bill.

It appears to me that the plaintiff has removed the defendant's objections to the plaintiff's right to the discovery sought for by the bill. There is no doubt that where a discovery is sought in relation to matters in which the plaintiff has no right or interest, but as consequential or resulting from a character or title attaching to the plaintiff, if such right and character is denied by the answer, and does not otherwise appear on the record, the plaintiff has no equity entitling him to the discovery; but it must also be observed that although the interest in the subject-matter of the required discovery results from a given character and interest alleged in the bill, yet if in the bill it is properly averred that the required discovery will establish the title and case which the plaintiff avers to exist, the defendant cannot, by generally denying the character and interest claimed by the plaintiff, withhold the discovery of the evidence in the possession of the defendant, which it is averred will prove the title and interest alleged to exist, and will also establish the fraud in the defendant by which the plaintiff's remedies will be affected or destroyed. It therefore seems that

the nature and effect of the discovery which the plaintiff seeks is such as he is well entitled to, notwithstanding the defendant's denials, inasmuch as such discovery is required as the means of proving the matters which the defendant denies, and even, as observed by Lord Redesdale, "although the defendant by his answer denies the title of the plaintiff, yet in many cases he must make a discovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the discovery." Mit. Pl. p. 369, 5th ed.

With respect to the defendant's further objection, that the discovery which he is required to give will compel him to disclose the evidence by which he (the defendant) is to establish his own case and title, it is to be remarked that the direct and immediate object of the discovery is not to compel a disclosure of the evidence upon which the defendant is hereafter to rely, although such an effect may be incidental or consequential to the discovery, but the immediate object and purpose is to prove the alleged fraud by which the defendant has unduly obtained the legal estate to the prejudice of the plaintiff; and, although the general position as stated on the part of the defendant may be correct, that a litigant party has no right to a discovery of the evidence of his opponent's title, yet he has a right to a discovery of the evidence in support of his own title, and in proof of any fraud which has been committed to his injury; and the plaintiff's equitable right to a discovery of material evidence in support of his own case and title is not repelled because, by exercising that equitable right, the defendant may be compelled to disclose the evidence in support of his (the defendant's) title and case.

In the present case I think the plaintiff is entitled to the discovery, notwithstanding it may produce the consequence to the defendant which he alleges. Many authorities were referred to in the course of the argument, but it appears to me that none of them entrench upon the principles upon which I hold the plaintiff to be entitled to the discovery under consideration. Lord Redesdale states that, "in general, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims." Mit. Pl. pp. 225, 226, 5th ed. But the same author, p. 371, says, "Where a discovery is in any degree connected with the title" (that is, the title of the plaintiff), "it should seem that a defendant cannot protect himself by answer from making the discovery."

The present case appears to me to fall within the principle thus laid down, and such principle is not impugned by any of the authorities which have been cited. Upon these grounds, the appeal must be dismissed with costs.

RUMBOLD v. FORTEATH.

BEFORE SIR W. PAGE WOOD, V. C. APRIL 23 AND 28, 1857.

[*Reported in 3 Kay & Johnson*, 748.]

THE plaintiff claimed as heir-at-law of George Lord Rancliffe, deceased; the defendants, as devisees of the real estates of the deceased. The bill was for discovery, to enable the plaintiff to proceed in an action of ejectment, and for production at the trial of all deeds and writings relating to the real estates in question, or necessary for the purposes of the trial, and for an injunction to restrain the defendants from setting up outstanding terms, mortgages, incumbrances, or leases.[1]

The defendants, by their answer, admitted the possession of all such of the title-deeds and writings relating to the said real estates as were not in the possession of mortgagees; and admitted that there were outstanding terms, but offered not to set up any outstanding term or legal estate on the trial of or in bar to any action of ejectment by the plaintiff.

The plaintiff having taken out the usual summons for production of documents, the defendants, by their affidavits, admitted possession of various scheduled documents relating to the question in the suit, but objected to produce them, upon the ground that, having regard to their answer, such production was immaterial to the relief to which the plaintiff was entitled.

The summons having been adjourned into court,

Mr. *Cairns*, Q. C., and Mr. J. S. *Moore*, for the plaintiff, now moved for the usual order for production.

The rule is, that an heir-at-law is entitled to come to this court, not only to have terms removed out of his way which would prevent his recovering at law, but also to have deeds and writings produced and lodged in proper hands for his inspection, before he has established his title. Harrison *v.* Southcote.[2] In the instruments prior to the will the plaintiff has an equal interest with the defendants; they form a necessary part of his evidence in support of his action, as showing the seisin of his ancestor Lord Rancliffe.

At all events, the plaintiff is entitled to production of all such deeds and writings as would tend to prove his own heirship.

[1] *Vide* 3 Kay & Johns. 44. [2] 1 Atk. 540.

They cited also Lady Shaftesbury *v.* Arrowsmith.[1]

Mr. *Willcock*, Q. C., Mr. *Rolt*, Q. C., and Mr. *C. Browne*, for the defendants. The only relief sought by the bill is an injunction to restrain the defendants from setting up outstanding terms, mortgages, and incumbrances. This the defendants, by their answer, submit not to do. Discovery, therefore, as to such terms, mortgages, and incumbrances is immaterial; and as to the rest, the plaintiff, claiming as heir, is not entitled to have them produced in aid of his action. All he is entitled to know is what is comprised in the parcels.

Mr. *Cairns*, Q. C., in reply.

The VICE-CHANCELLOR said he would take time to examine the authorities; but as there was nothing in which the court should be more careful than in making an order for production of documents in aid of an action of ejectment, if any order should have to be made in this case, the court would take care to limit the discovery to that to which the plaintiff was strictly entitled. *Judgment reserved.*

April 28.

VICE-CHANCELLOR SIR W. PAGE WOOD. The question in this case is, whether the plaintiff, claiming as heir-at-law, is entitled to production of deeds and writings (the possession of which is admitted by the defendants, who claim as devisees of the lands in question), with a view to establish his claim in an action of ejectment brought by him for the recovery of such estates.

I have examined the authorities, and I find that there is a clear distinction taken by Lord Rosslyn in Lady Shaftesbury's case[2] between applications of this nature made, as there, on behalf of an heir in tail, and applications where, as in Aston *v.* Lord Exeter[3] and Hylton *v.* Morgan,[4] the plaintiff claims merely as heir-at-law, — a distinction noticed by Lord Eldon in both the latter cases. Where the plaintiff claims as heir in tail, he has such an interest in the deed creating the entail that the court, as against the person holding back that deed, will compel its production; and on that ground it was that the order was made in Lady Shaftesbury's case. But the principle upon which that order proceeded has no application where the plaintiff claims as heir-at-law; and so it was held by Sir William Grant in Jones *v.* Jones,[5] repeating what Lord Rosslyn had said in Lady Shaftesbury *v.* Arrowsmith, that "all the family deeds together would not make the title of the heir-at-law either better or worse. If he cannot set aside the will, he has nothing to do with the deeds."

In Aston *v.* Lord Exeter,[6] Lord Eldon points out a further objection

[1] 4 Ves. 66. [2] 4 Ves. 66, 72. [3] 6 Ves. 288.
[4] 6 Ves. 293, 296. [5] 3 Mer. 161, 172. [6] 6 Ves. 288

to granting production of deeds upon a motion of this nature. He says, it would not only be contrary to the authority of Lord Rosslyn in Lady Shaftesbury's case, but would in effect enable the plaintiff to proceed at law without the authority and control of this court. Any such proceeding must be under the authority and control of the court; and if the court made the order for production, the plaintiff would be able to avail himself of it at law, where the proceedings would be beyond such authority and control.

It was argued in support of this motion that the plaintiff has an equal interest with the defendants in the deeds and writings prior to the alleged will, as forming a necessary part of his evidence of the seisin of his ancestor. But Bennett *v.* Glossop[1] is a direct authority against that contention. There the very same argument was urged on behalf of the heir-at-law; but the answer of the Vice-Chancellor was, that no issue was raised as to the ancestor's seisin. "I do not say," he adds, "that, if it appeared that the heir-at-law would be unable to make out his title in ejectment, without the aid of an instrument under which the defendant also claimed, by reason that the freehold was in a married woman at the time of her death, or for any other reason, he might not be entitled to a discovery of that trust; but no case of that kind is made upon the pleadings." So here I understand that the seisin of Lord Rancliffe is not in issue.

My only doubt is, whether, in case any portion of the deeds and writings of which production is sought by this motion tends to show or relates to the pedigree of the plaintiff, he would not be entitled to production of that portion. In Hylton *v.* Morgan,[2] where Lord Eldon refused, upon motion, to aid the plaintiff in proceeding at law without the authority of this court, in which he was followed by Sir John Leach in Barney *v.* Luckett[3] and Northey *v.* Pearce,[4] he still says, "as to the pedigree, I apprehend a production would be ordered;" and that is the inclination of my own opinion.

Order that defendants do make and file an affidavit stating whether any and which of the documents mentioned in the schedule to their affidavit, and what part or parts thereof, relate to or tend to show the pedigree of the plaintiff, with liberty for the plaintiff to inspect and peruse such of the said documents, or such part or parts thereof, as relate to the said pedigree, and to take copies, &c. And that defendants do produce such documents on the examination of witnesses in this cause, and at the hearing thereof. But defendants are to be at liberty to seal up such parts of the said documents as, according to such affidavit, do not relate to or tend to show the said pedigree.

[1] 3 Hare, 578.
[2] 6 Ves. 293.
[3] 1 Sim. & Stu. 419.
[4] 1 Sim. & Stu. 420.

EARP *v.* LLOYD.

BEFORE SIR W. PAGE WOOD, V. C. JULY 13, 1857.

[*Reported in* 3 *Kay & Johnson*, 549.]

THE bill averred that the plaintiff was seised in fee of a certain field or piece of land situate at or near a place called Oakeswell End, in the parish of Wednesbury, in the county of Stafford, and known by the name of "Oakeswell Piece," with all mines, minerals, ironstone, and other substances in and under the same; and that, in July, 1856, the plaintiff had received a letter signed by the defendant Lloyd, on behalf of himself and his co-defendants, whereby the defendants gave him notice that they were entitled to and were the owners of all the mines and minerals in and under a certain piece of land, which they described as "situate in the parish of Wednesbury, at or near a place called Oakeswell End," and certain cottages adjoining thereto; "which said land and cottages," the defendant's notice proceeded, "are now or formerly were called or known by the name of 'Finch Backs Farm, otherwise Pinch Backs Farm.'" The bill then averred that the piece of land referred to in the said notice is the said field or piece of land called Oakeswell Piece, but the same was never called or known by the name of Finch Backs Farm, otherwise Pinch Backs Farm. The eighteenth paragraph of the bill contained a charge that all the mines and minerals in and under the plaintiff's field called Oakeswell Piece belonged to the plaintiff absolutely, together with the surface of the said field; and that, with reference to a deed of 1699, on which the defendants relied as containing a reservation under which they claimed such mines and minerals, the said reservation, if any such there were, did not include the mines and minerals under that field or any part thereof, but must relate to some other land. The bill prayed that the defendants might be restrained from working ironstone or coal under the plaintiff's land.

The plaintiff having obtained an order for production of documents, the defendants filed an affidavit setting forth a list of documents in their possession relating to the matters in the bill mentioned, including certain maps, plans, and terriers, deeds, and other documents, for which

the defendants claimed protection, on the ground that they related to and showed, or tended to show, their title to the mines and minerals in the bill mentioned, and to win and work the same; and that none of them in any manner showed or tended to show that the plaintiff or any of the persons under whom he claimed had now or ever had any estate, right, title, or interest in or to the said mines and minerals, or any part thereof, or the truth of any of the matters in the bill alleged.

The plaintiff then took out a summons, which was now adjourned into court for the production of the documents for which the defendants by their affidavit sought protection.

Mr. *Rolt*, Q. C., and Mr. *Jolliffe*, for the plaintiff, contended that the documents ought to be produced. The question was one of boundary; and although the documents might contain evidence common to both parties, as being the evidence of the title of both, the plaintiff's right to discovery was not to be affected by that circumstance. Burrell *v.* Nicholson;[1] and see Vice-Chancellor Wigram's Points in the Law of Discovery, p. 325.

Mr. *James*, Q. C., and Mr. *Speed*, for the defendants, resisted the application.

The VICE-CHANCELLOR. Has not the plaintiff a right to see the parcels in your deeds having regard to the averments in the eighteenth paragraph of his bill? Otherwise the swearing is very like swearing to the contents of a document.

Mr. *James*, Q. C. Here the plaintiff's *prima facie* title is admitted, the defendants admitting his title to the surface; consequently the whole burden of proof lies with the defendants, who have to show that the minerals were reserved, and the plaintiff has no right to a discovery of that which relates exclusively to the way in which the defendants will make out the issue they have tendered.

They cited Bolton *v.* The Corporation of Liverpool,[2] and Adams *v.* Fisher.[3]

The VICE-CHANCELLOR. Burrell *v.* Nicholson is an authority in favor of the plaintiffs. There it was a negative averment on the plaintiff's part. He said, "I am not within the boundary;" and the defendants were ordered to produce the rate-books and documents in their possession which might establish that averment.

The case of The Attorney-General *v.* Thompson[4] was also cited.]

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD. The documents in question, so far as they describe or relate to parcels, must be produced.

[1] 1 Myl. & K. 681.
[2] 1 Myl. & K. 88.
[3] 8 Myl. & Cr. 546.
[4] 7 Hare, 106.

The case is this. The bill avers that the plaintiff is seised in fee of a field or piece of land at or near Oakeswell End, known by the name of Oakeswell Piece, with the mines and other substances in and under the same. It then sets out a notice given to the plaintiff by the defendant Lloyd, that he or his co-defendants are entitled to all the mines and minerals in and under a certain piece of land described in the notice as at or near a place called Oakeswell End, and as being now or formerly called or known by the name of Finch Backs Farm, otherwise Pinch Backs Farm; and then the bill avers that the piece of land referred to in the notice is the said field or piece of land called "Oakeswell Piece," and that the same was never called or known by the name of "Finch Backs Farm, otherwise Pinch Backs Farm."

The whole issue, therefore, between the parties is, whether the field or piece of land called "Oakeswell Piece" is or is not identical with or part of land now or formerly called or known by the name of "Finch Backs Farm," otherwise "Pinch Backs Farm."

That being so, the case comes as near to that of Burrell *v.* Nicholson[1] as can be. There the bill was for discovery in aid of an action to try whether the plaintiff's house was within the parish of St. Margaret, Westminster, and liable as such to parochial rates, the defendants being the parish officers and the vestry clerk of St. Margaret's. And the court ordered the production of rate-books and other documents, although containing evidence of the defendants' title, upon the ground that the question was one of boundary, as the documents in question might afford negative evidence of the plaintiff's title, by showing that his house was not within the parish in question.

And so in the case of Smith *v.* Duke of Beaufort,[2] where the question was, whether the defendant was bound to produce documents tending to prove that a custom or claim to dues demanded by him had varied at different periods as to the quantity of toll and in other respects, and thereby to impeach its legal existence and validity. The defence was that the documents were the defendant's title-deeds, and evidenced his right to the duty in question; but the documents were ordered to be produced, upon the ground that they did not exclusively evidence the defendant's title; they showed the variations in the bill alleged to have taken place at different periods in the alleged custom or toll, and thereby tended to disprove the defendant's title.[3]

So here the deeds which evidence the defendants' title may afford the strongest negative evidence to show that the field or piece of land called "Oakeswell Piece" is not identical with or part of land now or

[1] 1 Myl. & K. 680.
[2] 1 Hare, 507; s. c. affirmed on appeal, 1 Ph. 209.
[3] Id. 220.

formerly called or known by the name of "Finch Backs Farm," or "Pinch Backs Farm."

In fact, the object of this summons is not to have a discovery of title-deeds, as such, but to have a discovery of that which might have been contained in maps. Every thing that describes or relates to parcels, every thing that tends to show boundary, ought to be produced.

There must be an order for production of the maps, plans, and terriers mentioned in the schedule; and also of the deeds and other documents mentioned in the schedule, but with liberty to seal up on affidavit such parts of the deeds and other documents as do not describe or relate to parcels.

Ordered accordingly.

INGILBY v. SHAFTO.

BEFORE SIR JOHN ROMILLY, M. R. JUNE 22 AND 23, 1863.

[*Reported in* 33 *Beavan*, 31.]

THIS case came before the court upon exceptions for insufficiency to the answer of the defendant to a bill of discovery.

The bill was for discovery merely, in aid of a defence of actions of ejectment brought by the defendant Shafto against the plaintiff Ingilby.

The bill stated that the plaintiff was tenant for life in possession of copyhold lands in Yorkshire. It then proceeded to state how his title was derived, which was shortly as follows:—

Sir John Ingilby the testator, who died in 1772, devised them to Sir John Ingilby for life, with remainder to his son Sir William in tail, with remainders over. Sir John Ingilby was admitted, and he and his son, in 1804, surrendered them to the use of Sir John for life, with remainder to such uses as Sir William should appoint, &c., and they were admitted.

Sir John Ingilby died in 1815, and thereupon Sir William entered; he died in 1854, having devised them to the plaintiff for life. The plaintiff was thereupon admitted and was in undisturbed possession.

The bill stated that the defendant, in February, 1863, issued ten writs of ejectment in respect of portions of the copyhold, and it set out the vague particulars of the lands comprised therein.

The bill proceeded as follows:—

11. The said writs of ejectment comprise, in the whole, 847 acres only, but the claim which the defendant sets up extends to property of much greater extent and value.

12. The defendant has refused to disclose to the plaintiff the character in which he sues, or to furnish to the plaintiff the grounds or particulars of his said claim, or the facts, circumstances, or grounds on or by reason of which he pretends that the plaintiff is not such tenant for life in possession as aforesaid, and the proceedings in ejectment do not in any way disclose the character in which the defendant sues, or the nature of the case which is intended to be set up, or on what facts, circumstances, or grounds the plaintiff's title is disputed. But the defendant

some time since applied to the steward of the manor to admit him as tenant to the copyhold lands, which the steward has refused to do, and, on the occasion of the application, the defendant produced to the steward a pretended pedigree, and also a draft of a proposed admittance, from which it appears that the defendant then claimed, in some way which is not clearly disclosed and which the plaintiff cannot understand, to be entitled to admittance as the customary heir-at-law of Sir John Ingilby the testator, who died in the year 1772.

13. The said pretended pedigree was as follows: [setting it out].

14. The said pedigree is incorrect in many particulars, both by reason of incorrect statements of date and other incorrect statements contained therein, and by reason of the omission of many members of the family whose names ought to have been comprised therein; and, among other errors, by the omission of the names of Charles Ingilby and Columbus Ingilby, named in the will of Sir John Ingilby the testator, who died in the year 1772, and by the omission of the issue of Charles Ingilby and Columbus Ingilby, all of whom were prior to the defendant and the persons through whom he claims in the line of descent from Sir John Ingilby the testator, and by reason of other omissions and errors which the defendant has the means of supplying and correcting respectively.

15. Several of the persons through whom the defendant purports to trace his descent made dispositions by surrender, will, or otherwise of their copyhold estates, and dispositions of all their real estate sufficient to pass copyholds, or some other dispositions which would have passed any interest in the said copyhold estates which might have been vested in such persons respectively.

16. The defendant has in his possession or power, and within his knowledge, respectively, a large quantity of documentary and other particulars and materials, which, if produced, would show that the said copyhold estates have not descended on the defendant or on any other person being the customary heir of Sir John Ingilby the testator, who died in 1772, and would also supply the means of correcting the pretended pedigree, and show that the defendant is not such customary heir, and would otherwise establish the plaintiff's title; and if the defendant would make discovery of the matters within his knowledge as aforesaid, and of the documentary materials and particulars in his possession or power as aforesaid, the same would furnish a complete defence to the several actions of ejectment, by establishing the plaintiff's title to the said lands and negativing that of the defendant.

17. The plaintiff cannot safely proceed in his defence to the actions of ejectment respectively, without obtaining a discovery from the defendant of the character in which he sues, and of the nature of the

claim which he sets up, and of the several particulars aforesaid, and of all other particulars relating to the title or alleged title to the lands.

Upon these statements the plaintiff strictly interrogated the defendant, but as to their form it will be sufficient to refer to the exceptions, which will be stated presently.

The defendant put in a short answer, which commenced thus: "I am advised that the plaintiff is not entitled to the greater part of the discovery sought by his bill in this cause, and I have therefore omitted and decline to answer several of the interrogatories and parts of interrogatories to the bill. I claim and allege to be myself entitled to the lands comprised in the writs of ejectment in the bill mentioned, and I allege that the plaintiff has no title thereto, and I deny his title thereto."

The answer then proceeded to this effect: He did not know whether the plaintiff was tenant for life; he admitted the seisin of Sir John Ingilby, and believed he made the will stated in the bill, but could not say whether he had surrendered the copyholds to the use of the will. He believed that he died in 1772 or 1773, but that the first devisee was illegitimate. He submitted whether the surrender and admittance of 1804 barred the entail. He believed that Sir John and Sir William died at the times stated, but did not know whether he made the will stated. He admitted the actions of ejectment brought by him.

As to documents, he said as follows: I have, in the schedule hereto, "set forth a list of certain documents in my possession or power relating to the matters in the said bill mentioned. I do not admit that all such particulars establish or tend to establish the plaintiff's title affirmatively, but, in order to avoid any question on that ground, I am willing to produce all the documents specified in the first part of the said schedule."

He then claimed privilege for the documents in the second part of the schedule, as professional communications, and proceeded thus: —

"And save as in the said schedule appears, I deny that I have or ever had in my possession or power" any documents, &c., "which, if produced, would establish the plaintiff's title, or tend to establish the plaintiff's title, affirmatively to any of the copyhold lands," &c., "or which would, by establishing or tending to establish the plaintiff's title affirmatively to any of such lands or hereditaments, furnish a complete or any defence to the said actions of ejectment respectively."

The plaintiff took twenty-four exceptions to this answer, on the ground that the defendant had not answered the following interrogations, viz.: —

The 6th, which asked whether the surrender of 1804 had not been made, "and whether defendant impeached the same, and if so, in what respects and on what grounds."

The 7th, which was as follows: "Does the defendant claim the said

lands under any and what limitations of the will of the said Sir John Ingilby the testator, or as customary heir of the said testator, or in what character does the defendant claim the same? Does the defendant claim the said lands under the said John Wright, afterwards Sir John Ingilby," &c., and other persons specified?

The 8th, which was, "Does the defendant deny that the surrender of the 12th of September, 1804, effectually barred the estate tail of the said Sir John Ingilby," &c.

Part of the 16th was as follows: "Does not the defendant pretend or allege that the plaintiff is not such tenant for life in possession as aforesaid, or in what respects, and on what grounds, and by reason of what facts and circumstances does the defendant impeach the plaintiff's title, and what is the character in which the defendant claims the said lands and in which he sues, and what are the particulars, facts, circumstances, and grounds on which he pretends that the plaintiff is not such tenant for life as in the bill stated, or on which he the defendant pretends that he is entitled to the said lands?"

The 21st asked whether the pretended pedigree was not incorrect and contained omissions, and it went into particulars and details respecting it, and concluded thus:—

"Set forth all the materials and particulars in the knowledge, possession, or power of the defendant relating to the pedigree of the said family, and, in particular, by what links the defendant traces his descent, and the particulars of the births, deaths, and marriages on which the said alleged descent and heirship depend, and the parishes and places where the same occurred, and whether or not the several persons through whom the defendant traces his descent died intestate, and if not, what wills they respectively made."

The 23d was to this effect: "Has not the defendant or had he not once within his knowledge, and whether not in his possession or power," &c., documents "relating to the matters in the said bill mentioned, and whether or not particulars by which, if produced, it would appear that the said copyhold estates have not descended on the defendant," or on any person through whom he claims, or on the customary heir of Sir John Ingilby, who died in 1772, "and whether or not particulars which would supply the means of correcting the said pretended pedigree, and whether or not particulars which would show or lead to show that the defendant is not such customary heir as alleged, and whether or not particulars which would establish or tend to establish the plaintiff's title, and whether or not particulars relating to the pedigree of the said family, and to the dispositions of copyhold, and whether or not of real estate, by the members thereof, or some and which of them, and whether or not particulars which would furnish a complete or some and what

defence to the said actions of ejectment respectively, and whether or not particulars relating to the title to the said lands comprised in the said actions, and whether or not particulars relating in some way to the matters in the bill mentioned, or some one of such particulars as before mentioned."

The exceptions now came on for argument.

Mr. *G. W. Hemming* (in the absence of Mr. *Selwyn*), in support of the exceptions. He cited Mitford on Pleading;[1] The Attorney-General *v.* The Corporation of London;[2] Flitcroft *v.* Fletcher;[3] Lowndes *v.* Davies;[4] Bellwood *v.* Wetherell;[5] Metcalf *v.* Hervey;[6] Clegg *v.* Edmonson;[7] Smith *v.* The Duke of Beaufort;[8] 17 & 18 Vict. c. 126, § 51; and see Wigram on Discovery.[9]

Mr. *Jessel*, for the defendant, was stopped by the court.

THE MASTER OF THE ROLLS. I will look into this case, but my present impression is, on the whole, unfavorable to you.

In the first place, I apprehend the case is wholly independent of the Common-Law Procedure Act. If you were entitled to this discovery before that act, you are undoubtedly entitled to it now. I apprehend that if a plaintiff in equity filed a simple bill of discovery in aid of or as a defence to an action at law, he is not justified in coming here for the purpose merely of getting the defendant to admit documents, to save himself the trouble of proving them. That is to be done simply by calling upon his opponent to admit them at common law; and if he do not, he has to pay the costs of proving them, whatever those costs may be. But all that a party to an action at law is entitled to come for here is discovery of any matters which will aid him in his action at law. In that respect, undoubtedly, the plaintiff at law is entitled to call upon the defendant in equity to say whether he has not in his possession certain documents, or the knowledge of certain facts, which would enable him to establish his case at law. So a defendant at law is entitled to come into equity in the same manner to establish his defence at law. But I apprehend that no party to an action at law is entitled to call upon his opponent to say how he intends to frame his case, or how he intends to argue it, upon the facts which are known to all. I do not find, in this bill, a statement that the defendant is in possession of any documents, or has a knowledge of any facts, which would establish the plaintiff's defence to the actions of ejectment. [Mr. *Hemming*. I called your Honor's attention to the general allegation on that point contained in the bill.] If there be such, the plaintiff is entitled to have a dis-

[1] Page 9, 4th ed.
[2] 2 Mac. & G. 247, and 2 Hall & Twells, 1.
[3] 11 Exch. Rep. 543.
[4] 6 Sim. 468.
[5] 1 Younge & Coll. (Exch.) 211.
[6] 1 Ves. sen. 248.
[7] 22 Beav. 125.
[8] 1 Hare, 507, and 1 Phil. 209.
[9] Pages 285, 286, 2d ed.

covery of them, provided they do not amount to this, which the plaintiff is not entitled to ask, viz., to require the defendant to state how he puts his case.

I suggested, during the argument, the case of an overdue bill of exchange, where all the equitable defences are open to the defendant at law. I apprehend that the plaintiff at law is not entitled to come into this court upon a bill of discovery, and say, "You have pleaded that there was a want of consideration, that the consideration was a bad one, that the bill was obtained by fraud, and various other things of that sort: which of those do you intend to rely upon? By whom and in what way was it obtained by fraud? Was it obtained by John Smith in such a place or in such a manner? And in what way do you intend to make out your case?" No person is entitled to come in that way, nor is there to be found in the reported decisions any practice or procedure of this court of that description.

Here is a gentleman who has been in possession of land for some years, and ejectments are brought against him; whereupon he files a bill of discovery, stating a number of documents which tend to establish his title, and asks the defendant: "Do you intend to contest them, and if you do, in what form? You formerly alleged that you claimed this property under a particular pedigree: do you intend to claim under it now, and are not some of the allegations you make false?" How that assists the plaintiff, or comes within the rule that this court gives discovery in aid of a defence to an action at law, I am at a loss to see.

There is a distinction between a bill of discovery merely, and a bill seeking relief. Discovery is sought in both cases; in the latter case it seeks discovery with reference to the case stated and the relief prayed by the bill, and then the plaintiff may, within certain limits, call upon the defendant to state how and on what ground he can oppose the relief asked, because in such a suit the plaintiff may disprove the whole of it. But where the discovery is asked in aid of an action at law, then all that you can ask is for the discovery of facts and documents in the defendant's possession, the knowledge of which will assist you in proving your own title in the action.

It is here proper to make an observation with respect to the general statement as to documents. A bill praying relief only states the matters relating to that relief, and asks the defendant whether he has not documents in his possession relating to such matters, and he is bound to answer that. Where you file a bill of discovery in aid of an action at law, all that you can ask the defendant is, whether he has any document in his possession which relates to the action, or any fact within his knowledge which establishes the case of the plaintiff in equity. You may also require him to answer as to any specified fact which is alleged

in the bill and which relates to the action, but you cannot require him to give a discovery as to all the matters you may think proper to state in the bill, which do not relate to the action. I do not remember to have seen any such bill, but, if admissible, it might be filed by the plaintiff as well as by the defendant in ejectment. I think the *dicta* cited have reference to another subject-matter, and not to a bill of discovery in aid of a defence to an action at law. I think that the object of the insertion of the passages cited from the Common-Law Procedure Act was because no proceeding of this sort could before that act be sustained either at law or in equity. But if the case of Flitcroft *v.* Fletcher[1] be law, it seems to establish that you are entitled at law to call upon a plaintiff to set forth in what manner and on what ground he intends to support his claim. If so, your remedy is at law, and it would be undesirable that this court should give relief in the way now asked. I will carefully look into the authorities, and will mention the case to-morrow. Let it be in the paper to-morrow morning as part heard.

June 23.

THE MASTER OF THE ROLLS. The consideration I have given to this case since yesterday has confirmed me in the view I then expressed. I am satisfied that the province of discovery in equity is not to compel a defendant to set out in what manner he means to make out his case, or to deal with a certain set of materials, or whether he intends to dispute one proposition or another.

What the plaintiff is entitled to, as I expressed yesterday at the end of the plaintiff's argument, is this: he is entitled to the discovery of every thing in the possession of the other party, either of facts, deeds, papers, or documents, which will help him in making out his case at law; it is confined to that, and he cannot go beyond that. No doubt in cases praying relief you may do this: you may ask what defence do you make to my case, and on what ground. But that is because the court requires the case of each party to the suit to be pleaded, in order that neither may be taken by surprise. The result is, that having gone through the interrogatories and the exceptions fully, and the passages which were referred to, I think that the defendant has given the plaintiff all the discovery which he is entitled to.

It was said that the defendant had not answered whether he had any documents in his possession relating to the matters in the bill mentioned; but he has stated that he has no papers at all, other than those he has set forth, which assist the plaintiff's case. I think that this is sufficient, and that with respect to the rest, that he is not entitled to any further or other discovery.

[1] 11 Exch. Rep. 543.

I may add, that I have looked very carefully into Sir James Wigram's book, and I concur in the observations that he has made upon the subject, which are to be found at page 286 and the following pages. I think that what he there says is not overruled or contested by Lord Cottenham in the case of The Attorney-General *v.* The Corporation of London.[1] He has laid down the principle there with great ability and acuteness, and I think that that principle governs this case.

[1] 2 Mac. & G. 247.

BETHELL v. CASSON.

BEFORE SIR W. PAGE WOOD, V.C. NOVEMBER 5, 1863.

[*Reported in* 1 *Hemming & Miller*, 806.]

THIS case came on upon exceptions to the defendants' answer.

The plaintiff was lessee of certain minerals, and claimed to be entitled to the minerals under a piece of land which the defendants claimed to hold by a paramount title. The earlier title-deeds of the defendants were in the hands of a third person, who had covenanted to produce them to and at the cost of the defendants for the maintenance and manifestation of their title.

The bill alleged that these deeds would show that the land in dispute was not comprised in the defendants' estate, and interrogated the defendants as to the deeds, and required them to set them out; and the defendants, by their answer, stated to the above effect, and insisted that, as the plaintiff's object was to impugn their title, they had no right to call for the deeds under the covenant, and could not set them out.

Mr. *James*, Q. C., and Mr. *Hanson*, for the exceptions. The question is, whether a particular plot is part of the defendants' farm, or of the waste, the minerals under which are leased to the plaintiff. The bill states that the early title-deeds would show what parcels the defendants are entitled to, and that they do not include the disputed land. If we impeached his title, that might be a reason for declining to produce the deeds; but we admit his title, and only say that it has nothing to do with this particular piece of land. The defendants, therefore, have it in their power to procure these deeds, and are bound to give all the information which is in their power, and, at any rate, ought to have applied to the covenantors for their production, which they do not profess to have done. Taylor *v.* Rundell.[1]

Mr. *Rolt*, Q.C., and Mr. *Osborne Morgan*, for the defendants, were not called upon.

VICE-CHANCELLOR SIR W. PAGE WOOD. If the right claimed by the plaintiff existed, the case would have occurred a thousand times;

[1] Cr. & Ph. 104.

but I never before heard of an application that a defendant holding such a covenant as this should produce his deeds to a plaintiff in a suit of this description. Neither can I recall any instance in which a defendant, averring to the best of his belief, and setting out documents in his possession or power, has been considered bound to include documents and to furnish information which he cannot himself obtain, except by enforcing, at his own costs, a covenant for production.

It is true that, in some cases, it has been said that a defendant is bound to find the means of paying a solicitor, to enable him to put in an answer; but that is very different from requiring him to pay for the production of deeds, in order to furnish them to the plaintiff. These deeds are in the possession of a person who has covenanted to produce them to the defendants for the purpose of defending and manifesting their title. But the case before me is this: The plaintiff alleges that the deeds, when produced, will fall short of manifesting the title which the defendants claim under them, and that he desires to see them for the purpose of ascertaining that they do not convey so extensive a title as the defendants claim. The covenant was assuredly never entered into for any such purpose as this, — to compel the covenantor to produce the deeds for the benefit of any third person who might question the extent of the lands claimed to be conveyed by them. By such a production much collateral damage might ensue to the covenantor. If the defendants applied for and obtained production of the deeds, under the pretence of wanting them for the purposes of the covenant, that is to say, for the manifestation of their own title, and then used them for the information of the plaintiff, it would be a fraud upon the purpose of the covenant. I cannot compel a defendant to expend his money in obtaining information which, when he had obtained it, it would be improper for him to disclose. The exceptions must therefore be disallowed.

DAW v. ELEY.

BEFORE SIR W. PAGE WOOD, V. C. JUNE 5, 1865.

[*Reported in* 2 *Hemming & Miller*, 725.]

THE bill stated a patent dated 2d September, 1861, and granted in the usual terms to Francis Eugene Schneider, for "improvements in cartridges for breech-loading fire-arms," and that on the 26th day of August, 1861, by an instrument in the French form, duly registered at Paris, Schneider transferred two-thirds of the interest in his patent invention to the plaintiff, and that the plaintiff had been duly registered as equitable assignee of the patent.

The bill then set forth certain passages in the specification whereby the nature of the invention was described by reference to certain numbered figures, and then the specification concluded with a number of claims, whereof the first was, "the manufacture of cartridges described with reference to figures 1, 2, and 1*, and also the manufacture of cartridges described with reference to figures 3, 4, and 3*."

The bill then stated that the defendant Charles Eley had frequently, in the year 1862 and subsequently, tried to purchase the patent, but that the plaintiff had refused to sell it to him; that the said defendant had "fully recognized the novelty of the invention;" that the invention was "generally recognized and allowed to be a valid and novel invention in the trade, both in England and abroad."

It then stated that on the 23d February, 1864, the plaintiff discovered that the defendants were infringing the patent, and that they claimed a right to do so on the ground that they "had made and sold, in several instances, the central-fire cartridges many years prior to the date of the patent;" and charged that the cartridges so sold were cartridges known as Pottet's, and were essentially different from the patent cartridges, and that the defendants had sold large numbers of the patent cartridges, and had made considerable profits therefrom, for which they ought to account.

The 5th interrogatory was one requiring the defendants to set forth a description of all machines similar to the plaintiff's made or used by them prior to the date of the patent.

The 6th interrogatory required the defendants to set forth "the date or respective dates on which, and the person or persons to whom, any cartridges similar to those described in the specification were supplied and sold, and the price or prices charged therefor, and the name or names of the person or persons to whom they had sold or supplied any breech-loading cartridges from the 1st day of January, 1855, down to the present time."

By the 8th interrogatory they were required to state the size or sizes of the wire used by them in the manufacture of the gudgeons or anvils of their breech-loading cartridges, and the names of the persons from whom, and the places from which, they had purchased such wire for or in connection with the cartridges made by them from the month of January, 1855, to the present time.

The answer stated that the defendants' firm had been for the last ten years actively employed in the manufacture of cartridges for breech-loading guns, and had a considerable trade therein, and that they had manufactured and sold for the last seven years and upwards cartridges similar in all respects to the cartridges described in the specification by reference to the figures 3, 4, and 3*. It denied the novelty of the invention, and that the defendants or any of them had ever recognized such novelty.

The only answer given to the 5th interrogatory was a statement that a machine similar to that described in the specification was an old machine, which had been in use in England long before the 4th September, 1861, and that they had had such a machine in use on their premises ten years ago, but had since, and before the 4th September, 1861, taken down the same, and substituted improved and more suitable machinery for the same objects.

In answer to the 6th interrogatory they traversed the validity of the patent, and stated that they had sold to Mr. Lancaster a number of Pottet's cartridges in 1857 and 1858, and had at his suggestion made some variations therein (bringing the cartridges to something very like the patent cartridges) in the year 1857, and had sold him several such modified cartridges. And they submitted that the plaintiff was not entitled to a discovery in the terms of the said 6th interrogatory.

They similarly submitted in effect that they were not bound to answer the 8th interrogatory.

The plaintiff excepted.

Mr. *Rolt*, Q. C., and Mr. *Boyle*, for the plaintiff. The question is simply whether we are or not entitled to discovery before the validity of the patent has been established.

The 5th interrogatory, which is the subject of the 1st exception, requires them to set forth whether they have made or used machines

similar to ours before the date of the patent. We are entitled to know this, because the answer alleges that our machines are old, and we must know how to frame our objections on this head.

Then, as to the 2d exception, they admit that they have used cartridges identical with ours for years, and then only answering as to grooves, not also as to cut anvils, they conclude with a traverse "save as aforesaid."

[The VICE-CHANCELLOR. What they have sold before the date of the patent is their case, not your case.]

Mr. *Rolt*. We will show that it is ours. This discovery is necessary for the purpose of getting at the evidence of infringement, which we are entitled to get at once.

The case made by the bill is simply that of a patent dated in 1861, and used till just before the filing of the bill without any infringement, accompanied by offers on the part of the defendants to purchase the patent.

[The VICE-CHANCELLOR. What right have you to know what prior user they rely on? that is, to ask them what evidence they mean to use.]

Mr. *Boyle*. It is very important to obtain this discovery, in order that we may know how to shape our objections. The Patent Law Amendment Act requires us to state time and place.

[The VICE-CHANCELLOR. In the objections, but not at this stage.]

Mr. *Boyle*. We are entitled to learn whether it is worth our while to go on or not.

Then, as to the 3d exception, there is no attempt even to answer it. But if we knew where they got their wire, and what wire they used, we would be in a position to test the truth of their statements as to prior user; and we are entitled to this evidence to rebut the case they attempt to make on the other parts of the bill.

Mr. *Willcock*, Q. C., and Mr. *Langley*, for the defendants, were not called on.

VICE-CHANCELLOR SIR W. PAGE WOOD. There is nothing substantial in these objections.

Looking at what is stated in the bill, the question is, in fact, did the defendants, previously to September, 1861, use any machines of the specified construction? The defendants set forth that they have used a machine somewhat similar, which they discontinued before the date of the patent.

Is the defendant in a patent case obliged to set out all the machines he has used before the date of the patent? The discovery is either wholly immaterial to the issue, or else it is a defence for want of novelty.

The 2d exception stands on very much the same ground. The question is as follows: [his Honor read the 6th interrogatory].

A person comes here with a patent dated in 1861, and he says: "Tell me the names of every person you have dealt with and the goods you have sold for six years or so next before the date of my patent." That is a mere fishing question to help the plaintiff to get at the defendants' witnesses, and see what he can make of them.

The defendants say they made, in or before 1857, cartridges similar to those specified (and refer particularly to the specification), and they claim the right to continue to do so, unless and until the plaintiff shall have established the validity of his patent; and then they describe the modification introduced at Mr. Lancaster's suggestion in 1857, and conclude with a general traverse "save as aforesaid." That is to say, they say "there was a general similarity, and we take the articles therefore to have been in effect the same, and we decline to give you the particulars of our trade."

This seems to me to come to just the same dilemma as before.

Are you entitled to ask them the names of the witnesses which they intend to produce to establish their case? The only excuse for asking the question is that, if they say they sold the thing, you may get evidence that the things are not similar; it would be for you to do that when they produce evidence in support of their case: that does not entitle you to ask them to furnish you with the names of their witnesses. And there is no valid distinction between that question and the interrogatory which has not been answered in this case.

The 3d exception is out of all rule. In the bill there is no statement authorizing the plaintiff to ask it. "In my patent," says the plaintiff, "I have wire of a particular kind. If I know from you what wire you use, and from whom you buy your wire, I may be able to fish out something which will help me." Mr. *Boyle* put the case truly enough when he said, "I shall know whether to go on with the cause or not;" but the plaintiff has no right to inquire into the defendant's case with intent merely to get at an answer to the question, "How are you prepared to prove your case?"

I must therefore overrule all these exceptions, with costs.

BOVILL v. SMITH.

BEFORE SIR W. PAGE WOOD, V. C. JUNE 20, 1866.

[*Reported in Law Reports, 2 Equity, 459.*]

EXCEPTIONS to answer. The bill was one of several which had been filed for the purpose of restraining alleged infringements of the plaintiff's patent for an improved method of grinding corn, obtained in 1849, and extended for five years by the Privy Council in 1863, in the face of sixteen caveats, which were filed by a combination of millers, who appeared and resisted, but without success, Mr. Bovill's application for an extension of his patent.

The bill stated a variety of proceedings, both at law and equity, in which the plaintiff had obtained perpetual injunctions and recovered damages against persons who had infringed his patent, notwithstanding repeated attempts to invalidate the patent on the ground of prior user. The bill charged that the defences as to prior user, &c., relied on by the defendant were the same as those which had been relied on in some of the previous cases in which the plaintiff's patent had been established, and that the same would appear if the defendant would discover the place or places, and the manner, in which he alleged the plaintiff's invention was tried within this realm before the date of the patent.

Interrogatories had been filed, in which the defendant was asked: —

"(1.) Who does the defendant allege to have been the true and first inventor?"

"(11.) Does not the defendant allege that the plaintiff's invention was publicly used within this realm before the date of the plaintiff's patent? Set forth particularly when, and in what place or places, and in what manner, does the defendant allege that the plaintiff's invention, or any or what part thereof, was publicly used within this realm before the date of the plaintiff's patent."

In answer to interrogatory 1, the defendant stated his belief that the question, who was the first and true inventor, was now in course of being inquired into by his solicitor, and the facts in that behalf had not yet been fully ascertained; "but such facts, so far as the same were known to me, or so far as I have the means of ascertaining the same, relate

exclusively to my defence to plaintiff's bill; and I am advised that the plaintiff is not entitled to any discovery from me in this my answer respecting the same; and under the circumstances herein stated I decline to set forth whom I do allege to have been the first and true inventor of the said alleged invention."

In answer to interrogatory 11, the defendant stated that he did allege that the plaintiff's alleged invention was publicly used within this realm before the date of the patent; that the particulars of such prior user were being inquired into by his solicitor, and, as in his answer to the first interrogatory, defendant declined, as matter relating exclusively to his defence, to set forth when and in what place or places he alleged prior user.

To this answer the plaintiff excepted for insufficiency.

Mr. *Druce*, in support of the exceptions, contended that the plaintiff ought not to be compelled to try his right *ab initio* against every separate infringer, and that he was entitled to discover whether the defences set up by the defendant in this suit were those which the plaintiff had already succeeded in disproving, as such discovery, when obtained, would in effect support his (plaintiff's) case.

He cited Bovill *v.* Goodier;[1] Davenport *v.* Goldberg;[2] Attorney-General *v.* Corporation of London.[3]

Mr. *W. M. James*, Q. C., and Mr. *Little*, for the defendant, were not called upon.

Sir W. Page Wood, V. C., overruled the exceptions, observing that the plaintiff was not entitled to inquire generally into the way in which the defendant shaped his case in order to find out whether some of the persons alleged by him to have used the process before the date of the patent were the persons against whom the plaintiff had succeeded in other suits, though he might have asked if his process was the same as that used by A. B., or any one person specifically named, who had been a defendant in some former suit.

[1] Law Rep. 1 Eq. 85. [2] 2 H. & M. 282. [3] 19 Law Jour. (Ch.) 314.

HOARE *v.* WILSON.

BEFORE LORD ROMILLY, M.R. MARCH 14, 1867.

[*Reported in Law Reports, 4 Equity,* 1.]

IN this suit, which was instituted by the copyhold tenants of the manor of Hampstead against Sir T. M. Wilson, the lord of the manor, an order had been obtained, on the application of the plaintiffs, that the defendant should produce at the office of his solicitor, who was steward of the manor, such documents as were in his possession, which the plaintiffs were to be at liberty to inspect and peruse, and to make copies of the same.

The documents to which the order related consisted of court-rolls, and other deeds and papers relating to the manor.

The defendant now applied to the court, on an adjourned summons, that the order might be varied, by adding the words, "after payment to the steward of the manor of Hampstead of his customary fees."

Mr. *Selwyn*, Q. C., and Mr. *Eddis*, in support of the application. The steward, as custodian of the court-rolls for the benefit of all the copyhold tenants as well as the lord, is entitled to his customary fees when any tenant desires to inspect them. He cannot be debarred of this right because a copyhold tenant is plaintiff in a suit, and takes out a summons for their production. In Warriner *v.* Giles,[1] in an action of ejectment by the tenant of one of the London markets, the boundaries of which had been set out by the city after the fire of London, the plaintiff moved for liberty to inspect the books and take copies, which was granted, and "the court compared it to a case of court-rolls, which were not considered as the evidence of the lord, but in the nature of public books, for the benefit of the tenant as well as the lord."

These, therefore, are *quasi* public documents, and though the right of the plaintiff to inspect them is not disputed, yet the steward is fairly entitled to his customary fees, as a *quantum meruit*, for the care he takes of them; for if they were lost or tampered with he would be

[1] Stra. 954.

responsible, not only to the lord, but to those tenants whose titles depend upon them. At common law, a mandamus to compel the lord to produce the documents would only issue on an affidavit that a proper application had been made and refused. We submit, therefore, that as the tenants could, on payment of the fees, inspect the documents without the order of this court, the court will not, because this suit has been instituted, deprive the steward of his fees.

Mr. *Joshua Williams*, Q. C., and Mr. *Speed*, for the plaintiffs, were not called upon.

Lord Romilly, M. R. This is a novel point. There have been many suits about customs of manors, and many orders made for the production of documents of manors or for an inspection of them. But, unquestionably, I never heard before that, under an order of the court, the steward could decline to produce them unless the fees for inspection were paid. Before a suit is instituted, a copyholder may inspect documents, upon paying the usual fees; and all that the case which has been cited by Mr. Selwyn establishes is this, that if the motion had been resisted, the order would have been made *in invitum*, for they are documents which the plaintiff has a right to inspect, and to have produced in the cause, in the ordinary mode in which every plaintiff is entitled to inspect documents in the hands of a defendant in which he has a common interest with the defendant. Therefore I must refuse the application, with costs.

HOFFMANN v. POSTILL.

BEFORE SIR C. J. SELWYN AND SIR G. M. GIFFARD, L. JJ.
JUNE 11, 1869.

[*Reported in Law Reports, 4 Chancery Appeals*, 678.]

THIS was an appeal from an order of Vice-Chancellor James, overruling certain exceptions to the answers of the plaintiffs to interrogatories exhibited by the defendant.

The bill was filed by Frederick Edward Hoffmann and others, the owners of a patent which was granted to Alfred Vincent Newton on the 22d of December, 1859, for "an improved construction of kilns and ovens for burning bricks, tiles, limestone, and other substances."

The plaintiffs had also taken out a fresh patent on the 24th of June, 1864, for "improvements in kilns or ovens for burning bricks, tiles, pottery-ware, limestone, cement, and other substances."

The defendant, Francis Postill, was a brick manufacturer at Scarborough, and had erected a brick-kiln in the neighborhood of that town, in which, as the plaintiffs alleged, he had adopted some of the improvements patented by the plaintiffs, thereby infringing their patent. The plaintiffs accordingly filed the present bill against him, praying that he might be restrained from using the improvements patented by the plaintiffs, and might account to them for all profits made by burning any substances in any kiln in which those improvements were used.

The 25th and six following paragraphs of the bill contained a full description of the construction of the defendant's kiln, pointing out the particulars in which it infringed the plaintiffs' patent.

The defendant, having answered the bill, filed a concise statement and interrogatories for the examination of the plaintiffs. In the concise statement he alleged that his kiln was constructed upon the principle of a patent taken out by Mr. T. M. Gisborne, and was no infringement of the plaintiffs' patent; that the alleged improvements patented by the plaintiffs were not new; and that they were not distinctly explained in the specifications.

The interrogatories filed were very voluminous, the object of those respecting which the principal argument arose being to obtain admis-

sions by the plaintiffs that their improvements were substantially identical with improvements which had been described in the specifications of previous patents taken out by other persons.

In the 1st interrogatory they were asked whether in the year 1841 one Joseph Gibbs did not obtain letters-patent for an invention described as "a new combination of materials for making bricks, tiles, pottery, and other useful articles, and a machine or machinery for making the same, and also a new mode or process of burning the same, which machine or machinery and mode or process of burning are also applicable to the making and burning of other descriptions of bricks, tiles, and pottery." The plaintiffs were then interrogated as to the details of the improvements described in Gibbs' specification, with a view to show that his process was substantially the same as theirs; and were required to point out the difference between his improvements and those which were comprised in the plaintiffs' patent.

In several subsequent interrogatories the plaintiffs were asked similar questions respecting patents taken out by other persons previously to those under which the plaintiffs claimed.

Extracts from these interrogatories, showing the form of the questions asked, are given in the judgment of the Lord Justice Selwyn.

In the 11th interrogatory, the plaintiffs were questioned respecting proceedings taken by them in the kingdom of Saxony against persons infringing their patent in that country, in which the plaintiffs were alleged to have been unsuccessful.

In the 12th interrogatory, the plaintiffs were required to set forth a correspondence between them and Mr. T. M. Gisborne, respecting the patent granted to A. V. Newton.

In the 14th, the plaintiffs were required to set forth full and descriptive particulars of the alleged infringements of which they complained.

The plaintiffs put in an answer to these interrogatories. They admitted the granting of the patents to the persons mentioned in the interrogatories, but denied in each case that the improvements were substantially the same as those included in their own patents; and as to the rest of the inquiries, in each case they objected to answer them, in the following terms: "We are advised that the remainder of the discovery sought by this interrogatory relates exclusively to our case against the defendant in this suit, or relates to matters of law, and that the defendant is not entitled to any discovery from us in this our answer respecting the same, and we submit to the judgment of this honorable court that we are not bound further to answer this interrogatory."

They objected to answer the 11th interrogatory on similar grounds, and also because "it was irrelevant to the matters in question in the present suit."

With respect to the correspondence asked for in the 12th interrogatory, they submitted that the discovery sought for might more conveniently be obtained by means of an application in chambers upon the affidavit of the plaintiffs, and, therefore, to avoid expense, declined to answer the interrogatory.

As to the particulars sought for by the 14th interrogatory, they said that "the particulars of the said infringements are fully, and, as we submit, sufficiently set forth in the original and amended bill filed in this cause."

The defendant filed twelve exceptions to this answer.

The important exceptions were the first six, which related to the answers to the interrogatories as to the previous patents; the 7th, which related to the answers to the 11th interrogatory as to the proceedings in Saxony; the 9th, which related to the answer to the 12th interrogatory, as to the correspondence between the plaintiffs and Mr. Gisborne; and the 12th, which related to the answer to the 14th interrogatory, respecting the particulars of alleged infringements.

The Vice-Chancellor overruled all the exceptions, and the defendant appealed from his decision.

Mr. *Webster*, Q. C., Mr. *Kay*, Q. C., Mr. *Swanston*, Q. C., and Mr. *Beetham*, for the defendant. The interrogatories may appear voluminous, but, if fairly answered, they will save expense, because the examination of witnesses will be in great measure saved. This applies to the interrogatories respecting the acts of infringement and the correspondence. The defence made by the defendants to the plaintiffs' charges is, that there is no novelty in the plaintiffs' patent, and the defendant is entitled to prove this by the plaintiffs' own admissions. Renard *v.* Levinstein.[1] The plaintiffs object to answer, on the ground that the questions relate not to matters of fact, but to what appears on the specifications; but the nature and effect of previous inventions, and the difference between the plaintiffs' processes and those described in the specifications, are matters of fact to which the plaintiffs must pledge their oath, although for explanation it is necessary to refer to the written documents. Hill *v.* Evans.[2]

The counsel for the plaintiffs were not called upon with respect to the 7th and 9th exceptions.

Mr. *Grove*, Q. C., Mr. *Aston*, and Mr. *Lawson*, for the plaintiffs. If a plaintiff in a patent suit is to be obliged to answer interrogatories of this nature, the time occupied in such suits, and the consequent expense, will be enormously increased. With respect to the interrogatories in the present case as to the previous patents, we contend, in the first place, that the defendant has no right to ask for discovery from us as to

[1] 11 L. T. N. S. 79. [2] 31 Law Jour. (Ch.) 457; 4 De Gex, F. & J. 288.

the previous use of the invention, for the purpose of impeaching our title. Daw v. Eley.[1] That case is identical with ours, except that the interrogatories were exhibited by the plaintiff instead of by the defendant. Secondly, the defendant calls on us to answer as to matters which are not matters of fact, but inferences from documents. It is the province of the court to put a construction upon the specifications, and to draw conclusions from them. Neilson v. Harford.[2] The documents in this case are not even in evidence. The defendant says, in effect: "If I put in evidence these specifications, what is your answer to them? How do you distinguish the inventions described in them from yours?"

The exceptions are also wrong in point of form, for they include parts of the interrogatories which we have answered; and if the answer is sufficient as to some of the questions included in an exception, the exception must be overruled. Higginson v. Blockley.[3]

Mr. *Webster*, in reply.

Sir C. J. Selwyn, L. J. I trust that our decision in this case will not be productive of such disastrous results with respect to the expense of patent suits as those which have been anticipated by Mr. Grove in his argument, because I think that the protection, and the only protection, which the court can successfully extend to a suitor in cases like this, is by a careful and diligent exercise by the judge, at the hearing of the cause, of the power which is vested in him of dealing with the costs of these proceedings. Our decision in this case will leave it entirely within the power of the learned Vice-Chancellor to order that all the costs occasioned by these interrogatories — the answer, the exceptions, the hearing of the exceptions before him, and the hearing of this appeal — shall be dealt with as he in his discretion shall think fit; and if it shall appear that the power which the court, for the purpose of justice and discovery, gives to the parties to administer interrogatories to each other has been abused, I have no doubt the learned Vice-Chancellor will take care that justice shall be done, and will make the party who is to blame pay all the costs of the improper exercise of this power.

On the other hand, it must be borne in mind that it is almost impossible for the court, at this stage of the proceedings, to determine what propositions will be material to the case of one or other of the parties. A certain latitude must always be allowed in seeking discovery, and, accordingly, we have examined these exceptions with reference to the general rule, that the person who is bound to answer must answer fully.

With respect to many of the interrogatories, and, I think, even many of the exceptions, in this case, it appears to me perfectly obvious that

[1] 2 H. & M. 725. [2] 1 Webst. Pat. Cas. 331, 370. [3] 1 Jur. N. S. 1104.

they never could produce any good result to the defendant, by whom they are filed. Take, for instance, the 7th exception, which relates to certain legal proceedings which have taken place in a foreign country. It seems to me preposterous to suppose that the plaintiffs ought to be called upon to answer, or that their answering that question could be any benefit to any one. I think that exception must clearly be overruled.

So, also, with respect to the 9th exception, which requires them to set forth at full length certain correspondence. The forms of the court do not require plaintiffs to do any thing of the kind. I think, therefore, that exception must be overruled.

With respect to the 10th exception, assuming that the defendant had a right to ask the plaintiffs to set forth "the full and descriptive particulars of the alleged infringement or infringements of the said letters-patent," upon which it is unnecessary to express any opinion, I think that that has been completely answered by the 19th paragraph of the answer, where the plaintiffs say: "The particulars of the infringements are fully and, as we submit, sufficiently set forth in the original and amended bills filed in this cause." They there adopt, in substance, and upon oath repeat, the particulars of the infringement as they are stated in the amended bill. I think that is a sufficient answer, and therefore the 10th exception must be overruled.

But with respect to the others, I think the fallacy of the argument which has been addressed to us is apparent, because it depends mainly upon these two propositions. First, that wherever there is a question relating to a matter of fact, and that question is so stated as to refer to any of the subject-matters of a specification or other written document, there the plaintiffs are not bound to answer, or, in other words, that it ceases to be a question of fact because it refers to a written document. I think that is erroneous, and that the question is not the less one of fact because, in mentioning the subject-matter of the question, the person administering the interrogatory refers to the specification, or some written document. The second proposition consists in this, and it is continually repeated in this answer, namely, that the discovery sought relates exclusively to the case made by the plaintiffs against the defendant in this suit. If it could be shown that it was not material to the case of the defendant, then, of course, that would be a good objection to the interrogatory; but, in truth, in a case of this description, the case of the defendant is, that the plaintiffs' patent is invalid, and every thing that is material to show that is part of the defendant's case, and he is entitled to discovery as to all the matters of fact which are or may be material to his case.

Applying those observations to these exceptions, taking, for instance,

one of the questions referred to in the 1st exception, namely, "Are not these sliding doors colorable variations of, or a mechanical equivalent for, the divisions or walls with openings between each compartment in the kiln?" it may be perfectly true that those sliding doors are referred to or mentioned in some specification or other written document, but it is not the less a question of fact. It is, in my judgment, a question of fact whether they are mechanical equivalents for the other contrivance which is there mentioned. That being so, I think the defendant was entitled to an answer to that question.

So, also, with respect to the 3d exception, on which considerable reliance was placed. The question, it is true, is mixed up with other inquiries, but there is a separate and distinct question: "Is not the said William Basford the inventor of the process of supplying fuel from the top or roof of the kilns?" If I were asked as to my belief whether the answer to that question will ultimately turn out to be of any advantage whatever to the defendant, I should be bound to answer in the negative. My belief is that it will not, but if I am asked as a matter of equity whether that is a question of fact which the plaintiffs are bound to answer, I am equally bound to say that it is.

It is unnecessary to go through all these exceptions at length, for they all depend on the same principle. I will only take one other as an instance, namely, the 5th interrogatory: "Is there not, therefore, in this arrangement a continual reciprocal action of the kilns or oven? Is there not a costless, gradual warming of the materials to be burnt?" &c. It is quite true that the word "therefore," as used in that sentence, does connect the question with what is mentioned in the specification; but it is, nevertheless, a question of fact, and a question which, in my judgment, the plaintiffs are bound to answer. I think, therefore, this exception must be allowed, as well as all the others which depend upon the same principle.

The order, therefore, of this court will be, that the Vice-Chancellor's order be discharged, except so far as it overrules the 7th, 9th, and 10th exceptions, and that all the exceptions will be allowed except the 7th, 9th, and 10th; but we shall reserve all the costs of the exceptions before the Vice-Chancellor, and the costs of this hearing, to be dealt with by the Vice-Chancellor as he shall think fit at the hearing of the cause.

Sir G. M. Giffard, L.J. I quite agree with the Vice-Chancellor in this case to the extent of overruling the 7th, 9th, and 10th exceptions; the 7th exception, because it refers to proceedings which, to my mind, in themselves are quite irrelevant; the 9th, because it asks that the correspondence shall be set forth in terms; and the 10th, because the particulars have been already set forth by the plaintiffs.

But with respect to the other exceptions, I cannot accede to the

principle which was laid down by Vice-Chancellor Kindersley in Higginson v. Blockley,[1] that because an exception is bad in part, therefore it is bad in the whole. I think the exceptions as to the other interrogatories must be allowed, because there are some parts of them, unquestionably, which deal with matters of fact, and with matters of fact which are material to the defendant's case.

As regards the case of Daw v. Eley,[2] it must be always remembered that that was the case of a plaintiff exhibiting interrogatories to a defendant, and it was there held that the plaintiff could not call on the defendant to set forth the particulars of his defence. But when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. It is the defendant's business to destroy the plaintiff's case, and there the defendant has a right to ask all questions which are fairly calculated to show that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement.

Again, with reference to a great majority of the arguments which have been urged in this case, it is enough to say that it is almost impossible, where you have antecedent publications in a book, or antecedent patents which are alleged to destroy the novelty of the succeeding patent, whether it be in examining the parties by interrogatories, or in examining witnesses, to avoid the necessity of referring to those documents, and asking a variety of questions respecting them, some of which are more proper for the court, but many of which are absolutely essential in order to enable the court to come to a proper conclusion as to the legal effect of the different specifications.

Under these circumstances, therefore, I think that the order which we now make, leaving the costs in the hands of the Vice-Chancellor, will do justice between the parties. At the same time, I cannot part with these interrogatories without saying that they are needlessly long, needlessly vexatious, and in a form which I hope never to see again.

[1] 1 Jur. N. S. 1104. [2] 2 H. & M. 725.

THOMPSON v. DUNN.

BEFORE LORD HATHERLEY, C., AND SIR G. M. GIFFARD, L. J.
JUNE 7, 1870.

[*Reported in Law Reports, 5 Chancery Appeals, 573.*]

THIS was an appeal by the plaintiffs from an order of Vice-Chancellor Malins, overruling exceptions to the answer of the defendant Dunn.

The case made by the bill was to the following effect: The testator, Francis Huggins, bequeathed his residuary personal estate, including specifically the good-will of his business as an innkeeper, to his executors Taylor and Fearn, upon the trusts thereinafter declared; and directed that his wife should have the option of carrying on his business during her widowhood, and that his trustees should permit her, while carrying it on, to have the entire use, disposal, and management of all the capital, credits, stock, and effects which should be due, owing, or belonging to him in the business, and of all other his personal estate. The profits were to belong to the wife, for the support of herself and such of the testator's children as should be under twenty-one, and not otherwise sufficiently provided for. After her death or marriage, or giving up the business, the trustees were empowered to carry it on, and if they thought fit not to do so, they were to convert the estate and invest it upon trust as therein mentioned.

The testator afterwards, by a codicil, substituted the defendant Dunn for Taylor as executor and trustee. He died in 1862, and the will was proved by Dunn alone. The bill alleged (par. 8) that, for the purpose of carrying on the business, the widow possessed herself, with the privity and consent of Dunn, of all the testator's personal estate not specifically bequeathed, except so much as was requisite for payment of the testator's funeral and testamentary expenses, which were duly paid by the executor; and that, by means of the personal estate so possessed by the widow, she paid all the testator's debts and carried on his business.

The plaintiffs, who were brewers, alleged that the widow, at the time of her death in 1867, was indebted to them for beer supplied to her for the purposes of the above business, and that she died intestate,

and that no person had taken out administration to her estate. The bill was filed against Dunn and the three children of Mrs. Huggins, claiming a lien on the personal estate authorized by the testator to be used in the trade; and it prayed for an account of what was due to the plaintiffs and other unsatisfied creditors upon the trust estate of the testator; that it might be declared that the plaintiffs and such other creditors had a lien upon the personal estate authorized to be used in the trade; that accounts might be taken of such personal estate, and that, if necessary, an account might be taken of the testator's debts and funeral expenses; and that provision might be made, out of the estate authorized to be employed in the trade, for payment of the plaintiffs and the other unsatisfied creditors on the trust estate.

The interrogatory founded on par. 8 asked whether the widow did not, "with the privity and consent" of Dunn, possess herself of all, or some and what part, of the testator's estate not specifically bequeathed, &c., and whether she did not "thereby or how otherwise, or in fact, pay all, or some and which, of the testator's debts, and whether or not carry on the testator's business." Dunn, in answer to this, admitted that the widow did, "without objection on my part," possess herself of all the personal estate not specifically bequeathed, and said he believed that the funeral and testamentary expenses were paid by her, "together with certain debts owing by the testator," out of the profits of the business. This formed the subject of the first exception.

The 14th interrogatory called for an account of the testator's personal estate, and of the personal estate employed in the business. Dunn answered as follows: "I submit to the judgment of this honorable court that I ought not to be required or compelled to set forth the account and give the discovery sought by the 14th interrogatory, until it has been decided whether or not the plaintiffs are entitled to a lien upon the testator's estate and effects sought to be enforced by their said bill; for if it should be decided that the plaintiffs are not entitled to such lien, the expense and trouble of setting forth such account and giving such discovery would be simply thrown away." Dunn stated his ignorance as to whether any thing was due to the plaintiffs for goods supplied or not. He admitted having got in after the death of the widow the personal estate employed in the business, and that he had in hand so much of it as he had not employed in payment of the testator's debts, but he did not state the amount. The refusal to render accounts was the subject of the second exception.

Vice-Chancellor Malins having overruled the exceptions, — the first on the ground that the interrogatory had been sufficiently answered, and the second on the ground suggested in the answer, — the plaintiffs appealed.

Mr. *Glasse*, Q. C. (Mr. *Chapman Barber* with him), for the plaintiffs, having opened the facts of the case, was stopped by the court.

Mr. *Amphlett*, Q. C., and Mr. *Fischer*, for Dunn, in support of the order. The tendency of the later cases has been to excuse a defendant from discovering what is not wanted to establish the plaintiff's title at the hearing, if there is a *bona fide* question whether the decision at the hearing will not show him to have no title. De La Rue *v.* Dickinson;[1] Swabey *v.* Sutton.[2] Clegg *v.* Edmonson[3] was appealed from, and the Lords Justices did not order the discovery.[4] Here we admit assets in hand, and the plaintiffs want no more to get a decree if they are right in point of law. Lockett *v.* Lockett[5] and Moore *v.* Craven (before the Lord Chancellor and Lord Justice Giffard, January 26th, 1870) support our contention. If it should be decided at the hearing that there is no lien, the bill must be dismissed, and the expense of giving accounts of the testator's estate will have been thrown away.

Lord Hatherley, L. C. In my opinion, it is impossible to support the order under appeal. There is no case in which the court has ever applied the doctrine of Adams *v.* Fisher,[6] so as to allow an executor by answer to refuse to set out an account of his receipts and payments. I do not mean to say that there might not be a case where the court would allow him to do so if the asking for the accounts was vexatious. But, looking at the position of an executor, the court has always thought it desirable that he should, by his answer, make a full discovery of the assets, so that the plaintiff may be in a position to move to have the balance brought into court. The case of a partnership stands on a different footing, for there no use can be made of the account before the hearing. So in the case of a patentee's suit, where the defendant denies infringement, an account of profits is of no use before the hearing; and in Moore *v.* Craven, a discovery of the names of the purchasers of the machines would not be of any use for the purposes of the suit. The court has often compelled executors to answer even where the discovery sought was vexatiously minute. I cannot say that in this case the plaintiff has no chance of obtaining a decree; and that being so, the only questions are, whether the interrogatories are improper, and if not, whether they have been sufficiently answered. It is impossible to say that the interrogatory as to debts was improper, and it has not been answered at all. The interrogatory as to the assets is very stringent, and may seem to require the defendant to set out an account of needless particularity; but these things must be looked at in a reasonable way, and it is well known that the court does

[1] 8 K. & J. 388. [2] 1 H. & M. 514. [3] 22 Beav. 125.
[4] 8 De Gex, M. & G. 798. [5] Law Rep. 4 Ch. 336. [6] 8 Myl. & Cr. 526.

not even sanction an executor's setting out a list of assets with the minuteness of an auctioneer's catalogue. We should be doing mischief if for the first time we were to hold an executor justified in refusing by answer to set out any accounts.

SIR G. M. GIFFARD, L. J. The court, while it takes care that no oppressive use is made of its forms of procedure, must take care that parties are not allowed to refuse discovery which they ought to make. This is not a partnership case, but an executorship case, and the exceptions must be allowed with costs. The expense occasioned by the defendants refusing to give discovery has been far greater than the expense of putting in a proper answer in the first instance.

ELMER v. CREASY.

BEFORE LORD SELBORNE, C., AND LORDS JUSTICES JAMES AND MELLISH. NOVEMBER, 18, 25, 1873.

[*Reported in Law Reports, 9 Chancery Appeals, 69.*]

THE bill in this case was filed by Robert Elmer, as heir-at-law to his father, William Elmer, and stated, that by an indenture dated in or about the year 1844, and made between William Elmer and John Creasy, William Elmer conveyed to John Creasy a piece of land at Upwell, subject to redemption on payment of £1,800 and interest. That William Elmer died in 1853 intestate; and that shortly afterwards J. Creasy went into the receipt of the rents and profits as mortgagee, and continued so. That the rents and profits were far more than sufficient to keep down the interest, and that the principal sum was very much reduced. That Creasy refused to state what was then due to him as mortgagee. And the bill prayed for an account with rests, and that, on payment of what was due, the defendant Creasy might be ordered to reconvey.

The plaintiff filed interrogatories, one of which asked that the defendant might set forth a full, true, and particular account of all rents and profits of the mortgaged hereditaments received by him, or come to his hands or to the hands of any person or persons by his order or for his use; specifying the dates when, and the persons from whom, and the times at which, he had received the same and every part thereof, and how and in what manner he had applied each and every part thereof.

The defendant, by his answer, stated that the principal money had not been reduced by the surplus rents, and submitted that it would be premature to set forth the accounts in the answer, and that he was not bound to do so. That the plaintiff had never, except by his bill, offered to redeem; and that the defendant had never refused to render an account, or to state the amount claimed by him in respect of the said mortgage debt.

The plaintiff excepted to this answer for insufficiency, in not having answered the interrogatory as to the accounts. The Vice-Chancellor *Malins* allowed the exceptions.

The defendant appealed.

Mr. *Hemming*, in support of the appeal:—

There is no authority that a mortgagee is bound, in his answer to a bill for redemption, to set out his accounts. The defendant submits to a decree, and will then account, which is all that can be required. No discovery which these accounts would give could be of any use to the plaintiff, and the defendant ought not to be required to go to all this expense and trouble. It might, and often would, lead to great vexation and oppression, as redemption suits are frequently instituted by paupers. No doubt a trustee or executor must set out his accounts in his answer; but he is in a fiduciary position, which a mortgagee is not.

Mr. *Ince*, for the plaintiff:—

The fact that the accounts will be taken under the decree is no reason why the defendant should not set them out in his answer. White *v.* Williams.[1] This is a redemption suit, and the plaintiff will have to pay for the answer which he requires. He has a right to know the state of the accounts, so as to be able to determine whether he will go on with the suit, Brookes *v.* Boucher;[2] and whether he can make out a case for an account with rests, for which at present he has no materials, Donovan *v.* Fricker;[3] Quarrell *v.* Beckford.[4] The defendant does not even state how much he claims as due to him. Carver *v.* Pinto Leite.[5] De La Rue *v.* Dickinson[6] does not apply.

Mr. *Hemming*, in reply:—

It is now admitted that the plaintiff is only fishing for information, and wants to see whether he cannot file a better bill. The court will not encourage such a practice, which may be used as a means of extorting money by threatening to put the defendant to the expense of making out an account which necessarily extends over many years.

November 25.

Lord Selborne, L.C., now delivered the judgment of the court:—

The question in this case is, whether a mortgagee in possession, defendant to a bill for redemption, admitting himself to be redeemable, can wholly decline answering interrogatories as to the state and particulars of the account which it is one of the objects of the suit to take.

We find no authority, and we see no reason, for treating a redemption suit as subject to any different rule in this respect from that applicable to a suit for any other kind of accounts necessary for or consequential upon the principal relief prayed.

The question whether, before the abolition of the Masters' offices

[1] 8 Ves. 193. [2] 8 Jur. (N.S.) 639. [3] Jac. 165.
[4] 1 Madd. 269. [5] Law Rep. 7 Ch. 90. [6] 3 K. & J. 388

(when exceptions to answers for insufficiency were heard, in the first instance, by the Masters, and not by the court), a defendant to an ordinary suit for such accounts could by answer protect himself from discovery as to the particulars of the accounts prayed, is discussed by Sir James Wigram, in sections 159 to 185 of his work on Discovery, and by Mr. Hare, in part iv., c. i., of his work on the same subject, with the usual ability of those writers. The result is, that (although, during the interval between Lord Kenyon's appointment as Master of the Rolls and the accession of Lord Eldon to the Chancellorship, a different practice was followed in certain cases, of which Jacobs *v.* Goodman[1] and Marquis of Donnegal *v.* Stewart[2] are examples) the true rule, as finally settled by Lord Eldon and his successors, was, that a defendant, submitting to answer (even when he altogether denied the plaintiff's title), was obliged to answer fully, not only as to other matters, but also as to consequential matters of account.

The principle expressed in Sir James Wigram's first proposition,[3] that "the right of a plaintiff to discovery is in all cases confined to the question or questions in the cause, which, according to the pleadings and practice of the courts, is or are about to come on for trial," might indeed have seemed to justify the postponement, until after the decree, of all discovery as to items of account, concerning which no special relief was prayed; especially if Lord Gifford was right in refusing (as he did in Law *v.* Hunter[4] and Walker *v.* Woodward[5]) to receive at the hearing, or to enter in the decree as read, evidence as to such items.

It must also be admitted that much unnecessary delay and expense might (and probably did, in many cases) result from the rule, that discovery as to such matters could be limited only by demurrer or plea. The rule, however, was in fact established, both on technical grounds (which may, perhaps, have lost some of their force since the removal of the hearing of exceptions for insufficiency from the Masters to the court), and also because a full discovery of the details of the account might in some cases enable a plaintiff to take an immediate and final decree at the hearing, for what, on the defendant's own statement, might appear to be due to him; and because, if this part of the discovery were postponed till a later stage, the plaintiff might run the risk of losing it altogether, by death or other intervening accidents.

In the Court of Exchequer, when that court exercised equity jurisdiction, exceptions to answers for insufficiency always came immediately before the court itself; and a larger degree of discretion as to

[1] 8 Bro. C. C. 487, n.
[2] 3 Ves. 446.
[3] Wigram on Discovery, sect. 25.
[4] 1 Russ. 100.
[5] Ibid. 107.

the allowance or disallowance of those exceptions, according to the view which the court might take of their materiality to the issues to be determined at the hearing in each particular case, prevailed. After the passing of the act for the abolition of the Masters' offices, efforts were very soon made to obtain in this court the benefit of a limitation of the plaintiff's right to discovery by answer, such as had prevailed on the equity side of the Court of Exchequer, and such as had recommended itself to the minds of Lord Kenyon and Lord Loughborough. In Swinborne *v.* Nelson [1] and Clegg *v.* Edmonson,[2] in both which cases I was counsel, this experiment was unsuccessfully made before the late Master of the Rolls; nor is it correct to say, that those decisions of Lord Romilly were ever reversed or overruled by the Court of Appeal. What really happened in the Court of Appeal was, that the Lords Justices succeeded in putting pressure upon the parties, so as to obtain their consent to reasonable terms for expediting the hearing, including such admissions for the purposes of that hearing as their Lordships thought sufficient; and, upon those terms, the exceptions or the appeals from the orders allowing them (I am not sure which, for these cases upon appeal are not reported) were ordered to stand over till the hearing. Vice-Chancellor Wood, in De La Rue *v.* Dickinson [3] (an exactly similar case to Swinborne *v.* Nelson [4]), thought himself warranted by those precedents in making an adverse order, that exceptions for insufficiency should stand over to the hearing.

It is manifest, however, that the question of sufficiency or insufficiency was by that mode of dealing with it evaded, and not determined. In all those cases the defendant by his answer had wholly denied the plaintiff's title to relief. They furnish, in any view of them, no authority for the claim of a defendant who admits (as the defendant here does) the plaintiff's right to relief, to refuse all discovery before the hearing as to consequential matters of account.

In the case before us, the plaintiff asks by the prayer of his bill that the account against the defendant, the mortgagee, may be taken with rests. He has not, indeed, alleged in his bill any circumstance entitling him by the course of the court to that particular relief. But if the course of the court entitles him in this stage of the suit to discovery as to the state of the account, it would be premature for us to assume that he may not by means of such discovery (and by amendment, if necessary, of his bill) be enabled to present to the court at the hearing a case requiring consideration in support of that part of the prayer.

We are not now called upon to determine whether the defendant must, in answer to these interrogatories, set forth as full and detailed

[1] 16 Beav. 416.
[2] 22 Ibid. 125.
[3] 8 K. & J. 388.
[4] 16 Beav. 416.

a statement of all the items of the account as he might be obliged to give under a decree for redemption. The court may be trusted to exercise a proper control over any attempt on the plaintiff's part to press for any such minuteness of discovery as would be either vexatious or unreasonable, as indeed it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively. Reade *v.* Woodrooffe.[1] But the present question is, whether the defendant is entitled to refuse to answer at all before decree as to these matters. The Vice-Chancellor has decided that he is not; and with that decision we agree.

The appeal must be dismissed with costs

[1] 24 Beav. 421.

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